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No. -

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBURG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION and STATE OF CALIFORNIA,
Petitioners,

VS.

HOOPA VALLEY TRIBE and HOOPA TIMBER CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

1. Whether California may impose a timber tax on a non-Indian purchaser of timber harvested on an Indian reservation if the revenues from the tax are used to fund general government services to the Indian tribe even though the revenues do not directly fund the production of the timber.

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Petitioners California State Board of Equalization, et al. respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on July 28, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 881 F.2d 657 and is reprinted in the Appendix at pages A-1—A-15. The decision of the United States District Court for the Northern District of California is published at 590 F.Supp. 198 and is reprinted in the Appendix at pages A-16—A-25.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 28, 1989. No petition for rehearing was filed. This petition for certiorari was filed within 90 days of July 28, 1989. This Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution; General Forest Regulations, 25 CFR, Part 1, section 163 (1989); The California Forest Taxation Reform Act (Cal. Rev. and Tax. Code sections 38101 *et seq.*). The provisions of the Supremacy Clause and the General Forest Regulations are reprinted in the Appendix at pages A-26 and A-27—A-44 respectively. Selected provisions of the California Forest Taxation Reform Act are reprinted in the Appendix at pages A-45—A-49.

STATEMENT OF THE CASE

This action was brought pursuant to 28 U.S.C. sections 1331 and 1362. The District Court ruled that California was preempted by federal law from imposing the timber tax on purchasers of timber harvested on the reservation of respondent the Hoopa Valley Tribe but that the Tribe was not entitled to attorneys' fees under 42 U.S.C. section 1988. The Ninth Circuit upheld both rulings.

The reservation of the Hoopa Valley Tribe lies in a rural area in northeastern California.[1] The population of the reservation is approximately 60 percent Indian and 40 percent non-Indian. All persons living on the reservation, both Indian and non-Indian, are eligible for governmental services provided by California through the state and local governments. In 1983 the cost of these

[1] The factual record in this action consists of a 72 page stipulation of facts. Although filed in 1984, there is no reason to believe that the matters described in the stipulation, apart from the effects of inflation, do not apply to the reservation today.

services, which include education, health, welfare, road maintenance, police and other services, was approximately $4.75 million.

Due to the remoteness of the reservation and a lack of other economic opportunities, almost all of the Tribe's income is derived from its extensive timber resources. Timber production on the reservation is regulated by the Bureau of Indian Affairs pursuant to regulations governing bidding procedures and the like, (General Forest Regulations, 25 CFR, Part 1, section 163.) California does not provide any services which directly relate to timber production and does not have any jurisdiction over tribal timber. However, California maintains the only paved road access to the reservation, and presumably other services which California provides have an indirect effect on timber production by contributing to the intangible benefits of membership in an organized society.

In 1976 California enacted the Forest Taxation Reform Act (Cal.Rev. & Tax Code.§§ 38101 *et seq.*), which imposes a tax on the ownership of felled timber. In the circumstances of this case, the tax was imposed on non-Indian logging companies which had contracts to harvest timber on the Hoopa reservation, and neither the Tribe nor its members were liable for its payment. However, it is conceded that the Tribe bore at least a portion of the economic burden of the tax because logging companies take tax considerations into account in making their bids.

In the years 1977-83 the average rate of the timber tax was 4.96%. The total timber tax revenue obtained from Hoopa timber in these years was approximately $154,000 annually, or approximately 1/30th of the cost of the services which California provided to the reservation.

REASONS FOR GRANTING WRIT

I

SUMMARY OF ARGUMENT

As then Justice Rehnquist pointed out in dissent in *Ramah Navaho School Board v. Bureau of Revenue* 458 U.S. 832, 847 (1982), there is a need for "a consistent and predictable rule of

law . . . [concerning] . . . the extent to which the states can tax economic activity on Indian reservations within their borders." This case presents an opportunity for this Court to fulfill that need in an appropriate factual setting. The decisions of this Court on which the Ninth Circuit relied, *White Mountain Apache Tribe v. Bracker* 448 U.S. 136 (1980) and *Ramah*, are factually distinguishable because neither involved the nexus between tax revenues and Indian-benefiting expenditures which exist in this case. Furthermore, in *Cotton Petroleum Corp. v. New Mexico* ____ U.S. ____ (1989), 104 L Ed 2d 209, this Court appears to have taken a preemption approach which places greater weight on the states' revenue needs than was taken in *White Mountain* and *Ramah*.

II

WHITE MOUNTAIN APACHE TRIBE V. BRACKER AND *RAMAH NAVAJO SCHOOL BOARD V. BOARD OF REVENUE* ARE DISTINGUISHABLE

Viewing this case as governed by *White Mountain v. Bracker* 448 U.S. 136 (1980), the Ninth Circuit held that the federal interest in maximizing the income the Hoopa Tribe obtains from its timber resources outweighed California's interest in raising revenue from the non-Indian purchasers of Hoopa timber. However, *White Mountain* is distinguishable due to the nature of the taxes involved. In *White Mountain* the two taxes at issue were Arizona's use fuel tax and motor carrier license tax. In its opinion this Court recognized explicitly that the use fuel tax was intended to compensate Arizona for the use of its highways. (*Id.*, at 150) The opinion did not contain a description of the purposes of the motor vehicle license tax, but under Arizona law at the time the revenues from that tax were likewise expended solely for highway-related purposes.[2]

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[2] This Court's opinion states that the use fuel tax and the motor carrier license tax were imposed under Arizona Rev. Stat. (sup. 1979) sections 28-1552 and 40-641. (*Id.*, 139-140) At that time Arizona law provided that revenues from these taxes were to be deposited in the highway users revenue fund for the maintenance of the state highways

Yet the activity on which these taxes were imposed was the non-Indian taxpayer's use of roads on the reservation which were maintained not by Arizona but by the Bureau of Indian Affairs. As this Court noted, "this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall." (*Id.*, at 150). In contrast, this is precisely such a case.

Ramah Navajo School Board v. Bureau of Revenue 458 U.S. 832 (1982), also relied upon by the Ninth Circuit, is likewise distinguishable on similar grounds. *Ramah* involved the consequences of a decision by New Mexico to save $368,000 by closing the only public high school reasonably close to the reservation of the Ramah Navajo Tribe. In order to provide an education for its children, the Ramah Navajo Tribe then obtained congressional funding to build a high school on reservation property. New Mexico taxed the gross receipts of the non-Indian contractor which the Tribe hired to build the school. Using the preemption analysis mandated by *White Mountain*, this Court held against the tax because "[i]n this case, the State does not seek to assess its tax in return for the governmental functions it provides to those who must bear the burden of this tax." (*Id.*, at 843).

In *Ramah*, New Mexico did not prove either its contention that it provided significant governmental services to the Ramah Navajo Tribe or, if such services were provided, that the services were funded by the tax in question. (*Id.*, at 845, fn. 10)[3]

This case is different from *White Mountain* and *Ramah* because it is undisputed that the revenues from the California timber tax contribute to the funding of the services which the state provides to the tribe and tribal members. As noted above, the cost of these services in the years in question was thirty times greater than the timber tax revenue obtained from tribal timber.

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and related matters. (Arizona Rev. State. (sup. 1979) sections 28-1595 through 28-1598.)

[3] Whereas New Mexico did not take any responsibility for the education of the children of the Navajo tribe, California spent $2,679,323 in 1983 on the education of children living on or near the Hoopa reservation.

IN THE CIRCUMSTANCES OF THIS CASE THE CALIFORNIA TIMBER TAX SHOULD BE UPHELD EVEN THOUGH IT IS NOT DIRECTLY RELATED TO THE PRODUCTION OF TRIBAL TIMBER

The Ninth Circuit held that the use of the California timber tax to fund services provided to the Hoopa Tribe was irrelevant because the revenues did not directly relate to the production of the tribal timber. But in reaching this conclusion the Ninth Circuit relied upon *White Mountain* and *Ramah* which, as noted above, are distinguishable.[4]

In *Cotton Petroleum Corp. v. New Mexico*, U.S. ____ (1989) ____, 104 L Ed 2d 209, this Court appears to have taken a more flexible preemption approach which places greater weight on the revenue needs of the states. Recognizing that the "relevant preemption test is a flexible one" (*id.*, at ____, 104 L Ed 2d at 231), this Court upheld New Mexico's taxation of a non-Indian oil lease on the reservation of the Jicarilla Apache Tribe. *White Mountain* and *Ramah* were distinguished by this Court on the grounds that: (1) New Mexico provided substantial services to both the Tribe and the taxpayer; (2) the tax did not result in an economic burden on the Tribe; and (3) the federal regulations concerning oil and gas production were not exclusive. (*Id.*, at ____, 104 L Ed 2d at 232-233.) The first of these differences clearly applies in this case because the services which California provides to the Hoopa Tribe are significant and undisputed. With respect to the second difference, the Bureau of Indian Affairs logging regulations involved in this case are similar to the oil and gas regulations involved in *Cotton Petroleum* in that neither contains any reference to, let alone explicitly prohibits, state

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[4] The Ninth Circuit also relied on *Crow Tribe of Indians v. State of Montana* 819 F.2d 895 (9th Cir. 1987), rejecting an indirect tax on the mineral resources of the Crow Tribe. However, as an earlier decision in that litigation makes clear, the combined rate of the taxes involved was 30%, and the tax was viewed by the Ninth Circuit as an attempt by Montana to appropriate the Crow Tribe's mineral wealth. *Crow Tribe of Indians v. State of Montana* 650 F.2d 1104, 1113-1117, (1982), mod. 665 F.2d 1390 (1982), *cert. den.* 459 U.S. 916 (1982). No such intent appears in this case.

taxation. With respect to the third difference, while it is true that in this case the Hoopa Tribe bears some of the burden of the California tax, *Cotton Petroleum* upheld the New Mexico tax even though it had "at least a marginal effect" on the Jicarilla Apache Tribe. (*Id.*, at ____, 104 L Ed 2d at 233.) Furthermore, in this Court's view the taxpayer's strongest argument in *Cotton Petroleum* was the fact that the revenues from the New Mexico tax far exceeded the cost of the services provided. In this case the converse is true.

Admittedly, this Court found in *Cotton* that New Mexico had some regulatory involvment in oil production on the Jicarilla reservation whereas California has no direct involvement in timber production on the Hoopa reservation. However, New Mexico's involvement was nothing more than certain regulations concerning "the spacing and mechanical integrity of wells" (*Id.*, at ____, 104 L Ed 2d at 209) and therefore did not result in any financial drain on New Mexico. California's expenditures are significant and at least some of the services provided, such as roads, undoubtedly have at least an indirect impact on timber production. To use this Court's words, "[t]he intangible value of citizenship in an organized society is not easily measured in dollars and cents. . . ." (*Id.*, at ____, 104 L Ed 2d at 235.)

CALIFORNIA HAS DEMONSTRATED A SUFFICIENT INTEREST TO UPHOLD THE TIMBER TAX

The above discussion demonstrates that, for the purposes of preemption analysis, California's interest in upholding its timber tax is stronger than were the interests of Arizona and New Mexico in *White Mountan* and *Ramah*. The next question is whether that interest is sufficient to uphold the tax. We submit that it is.

In these days of limited government funds and increasing demands for government services, California necessarily must avail itself of every possible source of revenue if it is to continue to provide the services which the public expects. Yet the timber tax is the only tax which California imposes which even indirectly impacts on the Hoopa Tribe. Tribal land is immune from the state property tax, income generated on the reservation is immune from

the state income tax, and reservation sales to Indians are immune from the state sales tax, cigarette tax and liquor tax. See *McClanahan v. Arizona State Tax Commission* 411 U.S. 164 (1973).

It is true that the tax does result in a diminution of the income the Tribe derives from its timber. But the impact is small, and in any event a precedent upholding the tax may well operate as an encouragement to other states to provide a full range of services to Indian tribes. In this case California continued to make expenditures benefiting the Hoopa Tribe after the District Court ruled against the tax. There is no indication that California will not do so in the future. But it is at least conceivable that some jurisdictions which must decide how much services to provide to an Indian tribe may be influenced to the extent to which the tribe participates in the necessary funding of the services. This is not to say that Indian tribes should pay for services received on a dollar for dollar basis. But a state which provides millions of dollars in services to a tribal reservation should not be preempted, at least in the absence of explicit congressional intent, from imposing a tax on non-Indian taxpayers that has only a minor annd indirect effect on that tribe.

CONCLUSION

For the reasons set forth above it is respectfully submitted that a writ of certiorari should be issued to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THE HOOPA VALLEY TRIBE, a federally recognized Indian tribe on its own behalf and on behalf of its enrolled members, and HOOPA VALLEY TIMBER CORPORATION, a tribal enterprise of the Hoopa Valley Tribe,

Plaintiffs/Appellees/ Cross-Appellants,

v.

RICHARD NEVINS, CONWAY H. COLLIN, ERNEST J. DRONENBURG, WILLIAM F. BENNETT, and KENNETH CORY, as members of the California State Board of Equalization; CALIFORNIA STATE BOARD OF EQUALIZATION; and STATE OF CALIFORNIA,

Defendants/Appellants/ Cross-Appellees.

Nos. 88-1560
88-1662

D.C. No.
CV-82-5903-MHP

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn Hall Patel, District Judge, Presiding

Argued and Submitted
June 8, 1989—San Francisco, California

Filed July 28, 1989

Before: Jerome Farris, David R. Thompson and Stephen S. Trott, Circuit Judges.

Opinion by Judge Farris

SUMMARY

Indians/Taxation

Affirming the district court's granting of partial summary judgment, the court held that California's timber yield tax against purchasers of tribal timber is preempted by federal law.

Plaintiff the Hoopa Valley Indian Tribe, because of the remoteness of the reservation, relies almost exclusively upon timber-related revenues for supporting the tribal budget. After California modified its ad valorem tax relating to timber and replaced it with the timber yield tax, assessed at harvest time and imposed on the first non-exempt entity to acquire ownership of the timber, the tribe filed suit. The tribe challenged the application of the timber yield tax to private companies who purchase timber from the Hoopa Timber Corp. or from the Bureau of Indian Affairs who provide management for tribal timber. The district court granted partial summary judgment to the tribe on the grounds of federal preemption but did not address the tribe's alternative argument that the tax was invalid because it infringed on tribal sovereignty.

[1] Preemption analysis in Indian tribal cases requires a particularized examination of the relevant state, federal, and tribal interests. If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted. [2] Federal laws and policies support and regulate the harvest of timber on tribal lands. [3] State taxes or regulations that interfere with tribal activities may be preempted if the tribal activity involves goods produced on Indian lands. [4] To be valid, the California tax must bear some relation-

ship to the activity being taxed. Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough. The state's general interest in revenue collection is insufficient to outweigh the specific federal and tribal interest with which the timber yield tax interferes. [5] The purpose of the timber yield tax bears no relationship to tribal timber. [6] Because the timber yield tax does not fund services that directly relate to the harvesting of tribal timber and is otherwise unconnected with tribal timber activities, the timber yield tax is preempted. [7] The tribe argued also that its claim for infringement of its right to tribal self-government entitled it to attorney's fees. The right to self-government qualifies as a substantial claim, [8] but it is not specifically grounded in the Constitution or federal statutes. [9] The right to tribal self-government also is based on treaty, and the court has held previously that a suit based on interpretation of treaty rights is not cognizable under 42 U.S.C. § 1983. The court affirmed the denial of attorney's fees.

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OPINION

FARRIS, Circuit Judge:

The California State Board of Equalization appeals the district court's grant of summary judgment in favor of the

Hoopa Valley Tribe. The district court held that federal law preempts the imposition of the California timber yield tax, Cal. Rev. & Tax Code part 18.5, on the harvest by non-Indian purchasers of timber owned by tribe. The Hoopa Valley Tribe appeals the district court's denial of its motion for attorney's fees. We affirm both determinations.

BACKGROUND

A. *The Tribe*

The Hoopa Valley Indian Reservation, the ancestral home of the Hoopa Valley Tribe, was established in 1864 and is the largest and most populous in California. *See* 8 Smithsonian Institution, *Handbook of North American Indians* 164-76 (W. Sturtevant ed. 1978); 1 Kappler 815 (1904) (executive orders); 13 Stat. 39 (1864). The reservation is located in Humboldt County, approximately 60 miles northeast of Eureka between the Coast Ranges and the Salmon-Trinity Alps Wilderness Area. This litigation concerns the portion of the reservation known as "the Square," an area approximately 12 miles on a side containing prime timber lands of pine, cedar, and Douglas fir. *See Handbook*, *supra*, at 176. Out of the 88,666 acres in the Square, title to 85,430 acres is held in trust for the tribe by the United States. Virtually all of that land is commercial timber land. An additional 600 acres of privately-owned land within the Square contains commercial timber. *Id.*

The remoteness of the reservation and the destruction of fish resources in the Klamath-Trinity River system limit tribal employment opportunities to the timber industry. The tribe relies almost exclusively on timber-related revenues for supporting the tribal budget. *See id.* The tribe established the Hoopa Timber Corp. in 1976 to improve the tribe's economic return from tribal timber resources. The corporation is neither a tribal nor a state corporation. Instead, it is a wholly-owned subordinate organization of the tribe, established

under Art. IX, § 1(p) of the tribal constitution. Management of tribal timber is provided by staff of the U.S. Bureau of Indian Affairs. *See* 25 C.F.R. part 163. The BIA sells tribal timber by competitive bidding to both the Hoopa Valley Timber Corp., which in turn processes the timber and sells it to off-reservation companies, and to private companies. Standard timber industry practice is for the timber owner to bear the economic burden of timber taxes imposed on timber purchasers.

The population of the Hoopa Valley Reservation is approximately 60% Indian and 40% non-Indian. The tribe has approximately 1,650 members. The tribe, county, state, and federal government all fund public services for the reservation. The state maintains State Highway No. 96, the principal route to and through the reservation, which also serves several towns to the north of the reservation. The county maintains 16 miles of road within the reservation. The tribe and the Bureau of Indian Affairs fund fire protection, education, public utilities, subsidized housing, recreational, and economic development programs and maintain 427 miles of local roads. The state and the tribe share the costs of local law enforcement. Welfare and health care costs are shared by the state, the federal government, and the tribe.

B. *The Tax*

In California, all real property, with certain exceptions, is subject to an ad valorem property tax. Cal. Const. art. VIII, § 1; *see also* Cal.Rev. ¶ Tax Code § 104. To promote sound timber management, conservation, and production, in 1976 the state modified the ad valorem tax as it applied to timber and replaced it with a yield and reserves tax, collectively known as the timber yield tax. Cal. Rev. & Tax Code §§ 38101-38908 (timber reserves tax repealed by 1982 Cal. Stat., Ch. 1058); *see generally* W. Unkel & D. Cromwell, *California's Timber Yield Tax*, 6 Ecology L.Q. 831 (1978). The yield tax is assessed at the time of harvest on the value of

timber at the time of harvest and is imposed on the first entity to acquire ownership of felled timber. Cal. Rev. & Tax Code § 38104-38110. If the first owner is exempt from taxation, the timber yield tax is due from the first non-exempt person to acquire legal or beneficial title to the timber. § 38104; Cal. Adm. Code Pub. Rev. R. 1026.

C. *Procedural History*

The tribe filed suit in October 1982, challenging the application of the tax both to private companies who purchase tribal timber directly from the BIA and to private companies who buy from Hoopa Timber Corp. or other Indian-owned firms. The district court granted partial summary judgment to the tribe on the grounds of federal preemption.[1] *Hoopa Valley Tribe v. Nevins*, 590 F.Supp. 198, 199 (N.D. Cal. 1984). The court did not address the tribe's alternative argument, that the tax was invalid because it infringed tribal sovereignty. *Id.* On December 30, 1987, the district court entered final judgment, awarding the tribe $368,659.15 in damages, the stipulated total of timber taxes on tribal timber collected by the state from 1977-82, and $249,016.32 in pre-judgment interest.

DISCUSSION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. We have jurisdiction under 28 U.S.C. § 1291. The federal jurisdictional barrier to suits challenging state taxes imposed by 28 U.S.C. § 1341 does not bar such suits by Indian tribes. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 470-75 (1976).

We review de novo the district court's grant of summary judgment. *Harkins Amusement Enter. v. General Cinema*

[1]The tribe moved for partial summary judgment on its preemption and tribal sovereignty claims.

Corp., 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989). We review the district court's denial of attorney's fees under § 1988 for abuse of discretion; however, we review de novo the legal principles the district court relied upon for its decision. *Lewis v. Anderson*, 692 F.2d 1267, 1269 (9th Cir. 1982).

A. *Validity of the Tax*

The district court found "that the exercise of state authority in assessing the timber yield tax against companies which purchase Tribal timber from BIA or from HTC or other Indian-owned firms is preempted by the pervasive federal regulation of Indian timber and is thus in violation of federal law." *Hoopa Valley*, 590 F. Supp. at 203. On appeal, California argues that its interest in imposing the tax outweighs the federal and tribal interests at issue.

[1] Preemption analysis in Indian tribal cases "requires a particularized examination of the relevant state, federal, and tribal interests." *Cotton Petroleum Corp. v. New Mexico*, 109 S. Ct. 1698, 1707 (1989) (quoting *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 838 (1982)). The question of whether federal law, which reflects related federal and tribal interests, preempts state activity is not controlled by the standards of preemption developed in other areas. *Id.* Ambiguities in federal law are to be construed generously in favor of the tribe; no specific congressional intention to preempt state activity is required. *Id.*; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43 (1980); *accord Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898 (9th Cir. 1987), *aff'd*, 108 S. Ct. 685 (1988). If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted. *Crow Tribe*, 819 F.2d at 898.

[2] Indian lands are exempt from state real property taxes. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164,

169-71 (1973). Federal policy encourages the economic development of tribal lands. *White Mountain*, 448 U.S. at 143. Federal laws and policies comprehensively support and regulate the harvest of timber on tribal lands. *Id.* at 145-49.

[3] State taxes or regulations that interfere with tribal activities may be preeempted if the tribal activity the state seeks to affect involves goods produced on the reservation. *Compare Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980) (upholding state tax on on-reservation sales of cigarettes to non-Indians because product obtained off-reservation) *with California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987) (state regulation of bingo games preempted because tribe was generating value on reservation through activities in which tribe had strong interest). In *White Mountain*, Arizona applied its motor carrier license and fuel taxes to the equipment and activities of a private contractor hired by the tribe to assist in harvesting timber on reservation lands. 448 U.S. at 139-40. The Court found those taxes preempted because they undermined the federal policy of assuring that timber sale profits inure to the tribe. *Id.* at 148-49. In *Ramah*, New Mexico imposed a tax on the gross receipts that a non-Indian construction company received from a tribal school board for the construction of a school for Indian children on the reservation. 458 U.S. at 834. Although the tax was paid by a private company, the Court found the tax preempted because it burdened the comprehensive federal scheme regulating education for Indian children. *Id.* at 845.

In *Crow Tribe*, we invalidated Montana's coal severance tax as applied to coal mined from tribal lands because the tax had a financial impact on tribal resource development activities. 819 F.2d at 899-900. Montana argued that its severance tax on coal did not burden the tribe's economic interests because the tax was imposed on the tribe's lessee, a private company, and not the tribe. 819 F.2d at 899. We rejected the

argument because the taxes ultimately reduced the royalty received by the tribe.[2] *Id.*

In *Cotton Petroleum* the Court reaffirmed the basic principles of *White Mountain* and *Ramah* while holding that New Mexico could impose its oil and gas severance tax on the production of oil and gas by non-Indians from tribal lands. 109 S. Ct. at 1711-13. The Court distinguished *White Mountain* and *Ramah* by recognizing that New Mexico regulated the oil and gas activities affected by the tax. *Cotton*, 109 S. Ct. at 1712. Additionally, the Court noted that the New Mexico tax primarily burdened non-Indian taxpayers. *Cotton*, 109 S. Ct. at 1712-13 & n.18. "This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which an unusually large state tax has imposed a substantial burden on the tribe." *Cotton*, 109 S. Ct. at 1713. The Court also noted that it had no reason to reexamine its summary affirmance of our decision in *Crow Tribe*, because the Montana tax "had a negative effect on the marketability of coal produced in Montana." 109 S. Ct. at 1713 n.17. In contrast to New Mexico's regulation of oil and gas in *Cotton*, California plays no role in the Hoopa Valley Tribe's timber activities. *Hoopa*, 590 F. Supp. at 201-02. Also unlike *Cotton*, the burden of the tax concededly falls on the tribe. *Hoopa*, 590 F. Supp. at 201 n.2.

The state argues that the district court erred because its interest in imposing the tax is much stronger than Arizona's interest in *White Mountain*. The state points out that in *White Mountain*, Arizona imposed motor vehicle taxes on entities that used reservation roads maintained by the BIA

[2] *Crow Tribe* supports one of the key underpinnings of the district court's decision in this case. California argued that the tax should not be preeempted because it did not affect activity conducted on the reservation, but instead fell on ownership of cut timber once title transfered to a non-Indian. The district court noted that this is "a distinction without a difference." *Hoopa Valley*, 590 F. Supp. at 201.

and not the state. Here, California notes that the timber tax helps fund various services used by tribal members, and that the services provided by the state to tribal members far exceed the income from the timber tax.

[4] The district court correctly determined that the state's interest was not strong enough to outweigh the substantial federal and tribal interests in timber harvesting on the reservation. The Supreme Court rejected a parallel argument in *Ramah*: "We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest these benefits are in any way related to the construction of schools on Indian land." 458 U.S. at 845 n.10; *see also White Mountain*, 448 U.S. at 150 ("We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber."). Although California points to a variety of services that it provides to residents of the reservation and the surrounding area, none of those services is connected with the timber activities directly affected by the tax. To be valid, the California tax must bear some relationship to the activity being taxed. *See Crow Tribe*, 819 F.2d at 900. Showing that the tax serves legitimate state interests, such as raising revenues for services used by tribal residents and others, is not enough. *Id.* at 901. "To the extent that this [coal severance] tax is not related to the actual governmental costs associated with the mining of the Indian coal . . . the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land." *Crow Tribe v. Montana*, 650 F.2d at 1117 (citations omitted).

[5] The state's general interest in revenue collection is insufficient to outweigh the specific federal and tribal interests with which the timber yield tax interferes. The services provided by the state and county are provided to all residents. The road, law enforcement, welfare, and health care services

provided by the state and county benefit both tribal and non-tribal members. California admits that there is no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally.

[6] The purpose of the timber yield tax bears no relationship to tribal timber. Prior to enactment of the timber yield tax, the state imposed an ad valorem tax on timber. Tribal timber was not subject to the tax. Recognition of the disincentives to proper timber management created by the ad valorem tax led to the enactment of the timber yield tax. *See* Unkel & Cromwell, *supra*, at 832-38. Those concerns were not relevant to tribal timber, because that timber was not subject to the ad valorem tax and was managed under detailed guidelines by the BIA. *See* Comment, *Challenging the Assessment of the California's Timber Yield Tax Against Purchasers of Indian Timber*, 13 Pac. L.J. 1325, 1327-30 (1982).

[7] Because the timber yield tax does not fund services that directly relate to the harvesting of tribal timber and is otherwise unconnected with tribal timber activities, the timber yield tax should be preempted.

B. *Attorney's Fees*

[8] A more difficult question is posed by the tribe's request for attorney's fees under 42 U.S.C. § 1988. The district court's decision was based on a preemption analysis, which this court has held is outside the scope of 42 U.S.C. § 1983 and therefore incapable of supporting an award of attorney's fees under § 1988. *See White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848-52 (9th Cir.), *cert. denied*, 479 U.S. 1060 (1987); *accord Central Machinery v. Arizona*, 152 Ariz. 134, 730 P.2d 843, 853-54 (1986), *cert. denied*, 481 U.S. 1042 (1987). Section 1988 fees may be awarded to a prevailing party if that party presented a substantial unadjudicated claim within the scope of § 1983 that was not alleged solely to

support the fee award. *Maher v. Gagne*, 448 U.S. 122, 130-33 (1980). The tribe argues that its claim for infringement of its right to tribal self-government is within the scope of § 1983 and therefore entitles it to attorney's fees.[3] The right to self-government qualifies as a substantial claim, because this court has recognized the right of tribal self-government as an independent basis for finding a state tax invalid. *Crow Tribe*, 819 F.2d at 902-03. The district court held that the tribe's right to self-government "preceded, and therefore is not secured by, any federal statute or the Constitution . . . and therefore is not cognizable under section 1983."

No reported decision settles the issue by determining whether the alleged infringement of the right to tribal self-government is a "deprivation of any rights, privileges or immunities secured by the Constitution or laws." 42 U.S.C. § 1983. Instead, we must analyze whether the right to tribal self-government is within the scope of § 1983. Some federal statutes, as well as constitutional provisions, create rights enforceable by § 1983. *See Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980) (scope of § 1983 encompasses violations of federal statutes); *Ramah Navajo School Board v. Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243 (App.), *cert. denied*, 470 U.S. 940 (1986) (Indian Self-Determination and Educational Assistance Act created right cognizable under § 1983).

[9] The tribal right of self-government is not grounded specifically in the Constitution or federal statutes. *See* E. Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 Hastings L.J. 189, 90-93 "The tribes do not have a constitutional right to maintain this [sovereign] status, nor do they have a consti-

[3]The right to tribal self-government claim was included in the complaint and briefed for the summary judgment motion. The tribe raises an additional claim, of tax immunity, that it argues is within the scope of § 1983.. This claim fails because the tribe admits it was not even briefed. Nor is the immunity claim distinct from preemption. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149-55 (1973).

tutional right to exercise any powers or attributes of sovereignty." *Id.* at 135. Instead, the right to tribal self-government is protected by treaty and federal judicial decisions. *Id.* at 91-93. "[T]he Constitution does not require continuing recognition of tribes as governmental entities [and] the treaty clause has come to be the source of federal legislative power over Indian affairs." *Id.* at 93; *see also* F. Cohen, *Handbook of Federal Indian Law* 231-35 (1982).

In refusing to award § 1988 fees for the preemption claim in *White Mountain*, this circuit stated that "§ 1983 was not intended to encompass those Constitutional provisions which allocate power between the state and federal government." *White Mountain*, 810 F.2d at 848. The question is whether the right to tribal self-government is one "that protects the individual against government intrusion." *Id.* In *White Mountain*, we distinguished power conferring provisions, such as the Supremacy Clause, from rights conferring provisions that protect the individual from government intrusion. *Id.*

Like the right to be free from state taxes preempted by federal law, the right to self-government is best characterized as a power, rather than a right. It enables a tribe to exercise powers as a sovereign, within the limitations provided by federal law. For example, tribes may determine their own form of government and membership, regulate hunting and fishing on reservations, regulate and tax resource development activities on tribal lands, decide criminal and civil disputes involving tribal members and civil disputes between tribal and non-tribal members. *See* Cohen, *supra*, at 246-57; L. Tribe, *American Constitutional Law* 1471 n.29 (1988) (citing cases). The tribe is asserting its right to exercise sovereignty, as opposed to protecting the personal liberty of its members. *See White Mountain*, 810 F.2d at 848. Because the right to tribal

government protects the powers conferred upon the tribe, and not individual rights, it falls outside the scope of § 1983.[4]

The right to tribal self-government is protected in part by federal judicial decisions. The tribe argues that because the right to tribal self-government is found within federal common law it is within the scope of § 1983. In support of that proposition, the tribe cites cases holding that 28 U.S.C. § 1331, the federal jurisdiction statute, encompasses federal common law. The scope of § 1983 does not parallel that of 28 U.S.C. § 1331. *See, e.g., Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (§ 1983 claim precluded if Congress includes within statutory scheme comprehensive remedial procedures); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) ("bill of rights" provision of Developmentally Disabled Assistance and Bill of Rights Act essentially precatory and therefore unenforceable under § 1983). Although § 1983 is to be construed liberally, the tribe can point to no cases that support incorporating federal common law into its scope.

We understand, but reject, the tribe's argument that the Act of April 8, 1864, 13 Stat. 39, is a federal law within the scope of § 1983. The Act merely authorized the creation of reservations in California and did not address the sovereignty or rights of Indians.[5]

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[4]The Supreme Court has characterized the right of tribal self-government as independent of but related to preeemption analysis. *White Mountain*, 448 U.S. at 143. The right of self-government also provides "an important 'backdrop' " to preeemption analysis. *Id.* (quoting *McClanahan*, 411 U.S. at 172). The Court has chosen not to ground its analyses of conflicts between state laws and tribal activities in the Constitution's Indian Commerce Clause, prefering to rely on the preeemption approach described above. *Ramah*, 458 U.S. at 845-46.

[5]In *White Mountain*, we held that the statutes regulating the harvest of tribal timber and federal policies concerning tribal timber development were not within the scope of § 1983. 810 F.2d at 852.

[10] The right to tribal self-government also is based on treaty. We previously have held that a suit based on the interpretation of treaty rights to take fish is not cognizable under § 1983. *United States v. Washington*, 813 F.2d 1020 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1593 (1988). The right to self-government may appear more akin to a § 1983-type civil right than the right to take fish. Nonetheless, both rights are grounded in treaties, as opposed to specific federal statutes or the Constitution.

CONCLUSION

We affirm the district court's determination that the assessment of the California timber yield tax against purchasers of tribal timber is preeempted by federal law. We also affirm the district court's denial of § 1988 attorney's fees to the tribe on the grounds that the tribe's claims were not cognizable under § 1983.

AFFIRMED. Each party shall bear its own costs of appeal.

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Appendix B

The HOOPA VALLEY TRIBE, a federally recognized Indian tribe, in its own behalf of its enrolled members; the Hoopa Timber Corporation, a tribal enterprise of the Hoopa Valley Tribe, Planitiffs,

v.

Richard NEVINS, Conway H. Collis, Ernest J. Dronenburg, Jr., Kenneth Cory, William M. Bennett, Members, State Board of Equalization; California State Board of Equalization; State of California, Defendants.

No. C-82-5903-MHP.

United States District Court,
N.D. California.

OPINION

PATEL, District Judge.

INTRODUCTION

This action is before the court on cross-motions for partial summary judgment. Oral argument was heard on the matter on March 5, 1984. After having considered all memoranda submitted by the parties and the arguments of counsel, the court concludes for the reasons set forth below that plaintiffs' motion for partial summary must be granted, and defendants' motion denied.

FACTUAL BACKGROUND

Plaintiffs are the Hoopa Valley Tribe ("Tribe") and the Hoopa Timber Corporation ("HTC"), a wholly-owned enterprise of the Tribe. Defendants are the California State Board of Equalization ("Board"), five individual members of the Board, and the State of California. Planitiffs challenge application of the timber yield tax and the timber reserve fund tax established by the 1976 California Forest Taxation Reform Act (Cal.Rev. & Tax.Code §§ 38101-38908), which are levied on "timber owners" against the value of timber at the time of harvest. Both taxes are referred to in this opionion as "the timber yield tax" or "the tax". The

timber reserve fund tax was repealed in 1982. 1982 Cal.Stat., Ch. 1058.

Timber on the reservation is held in trust for the Tribe by the United States and is sold annually by the Bureau of Indian Affairs ("BIA") through competitive bidding. When HTC is the successful bidder it buys from BIA and after processing the timber sells to off-reservation companies. On its face the timber yield tax applies to private companies who buy directly from BIA. Cal.Rev. & Tax.Code § 38104 provides that "timber owner" includes "the first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other person or agency or entity exempt from property taxation under the Constitution or laws of the United States . . . ." Defendants have not attempted to assess the tax directly against HTC or other Indian-owned firms when they are the successful bidders who purchase from BIA. However, the Board, which is charged with enforcing the tax, has ruled that the tax applies to purchases by private companies from HTC or other Indian-owned firms. A property tax rule has defined "timber owner" as "the first non-exempt person" who "acquires either the legal title or beneficial title to timber after it has been felled." Cal.Admin.Code Pub.Rev.R. 1026 (1980).

Plaintiffs challenge the application of the tax both to private companies who buy directly from BIA and to private companies who buy from HTC or other Indian-owned firms, on grounds of federal preeemption and infringement of tribal sovereignty. Because the court concludes that the state tax is preempted by federal law, it does not reach the issue of tribal sovereignty.

DISCUSSION

The parties agreed at oral argument that the analysis of this case must be guided by the Supreme Court's decision in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980)[1] In *White Mountain* the court held that

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[1] The court notes with some astonishment that defendants failed even to cite *White Mountain*, or any other case relied on by plaintiffs, in their moving papers. In view of the obvious relevanace of *White Mountain*

motor carrier and use fuel taxes imposed by Arizona on a non-Indian logging company operating on an Indian reservation were invalid because preempted by federal law. The Court determined that either preemption by federal law or infringement on tribal sovereignty could bar the application of state law to activity on the reservation or by tribal members. *Id.* at 142-43, 100 S.Ct. at 2582-83. Emphasizing that preemption standards which have been developed in other areas are unhelpful in analyzing preemption as it relates to Indian tribes, the Court called for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145, 100 S.Ct. at 2584.

Using this as the framework, the Court then examined in detail the extent of the federal government's regulation of the harvesting of Indian timber and concluded that it was comprehensive, with the BIA exercising "literally daily supervision over the harvesting and management of tribal timber." *Id.* at 147, 100 S.Ct. at 2585. The Court also concluded that the federal government exercised detailed supervision over BIA roads on the reservation. Finding the federal regulatory scheme prevasive, the Court concluded that assessment of state taxes would obstruct federal policies and that defendants had identified no service performed by the state that would justify assessment of taxes for activities on BIA and tribal roads. *Id.* at 148-49, 100 S.Ct at 2586-87.

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and the other cases, there is no excuse for defendants' attempt to skirt the issues they raise. Defendant's reliance in their moving papers on *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949) is spurious. Not only was no Indian tribe a party in *Oklahoma Tax Commission*, but the Court in no way considered Indian interests and in fact noted that there was no possibility the economic incidence of the tax could fall on the tribe. *Id.* at 353, 69 S.Ct. at 567. This 1949 case which did not even discuss the analysis to be applied when a state tax burdens an Indian tribe has no application to the case at bar and other cases cited by defendants obviously cannot insulate defendants from the anlaysis mandated by *White Mountain* and other recent cases.

The Court identified several ways in which the taxes would obstruct federal policy. First:

> At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding . . ." 25 C.F.R. § 141.3(a)(3)(1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government . . . The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

Id. at 149, 100 S.Ct. at 2586. Second, the Court found that "the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.* Finally, the Court concluded that "the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law." *Id.* at 149-50, 100 S.Ct. at 2586-87. The Court noted, in concluding, that it was "undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe." *Id.* at 151, 100 S.Ct. at 2587.

The case before this Court bears many similarities in the situation in *White Mountain*. The taxes here were also imposed on non-Indian companies, the identical federal regulations governing the harvesting of Indian timber are implicated, and the effect of the tax is to diminish the profit the Tribe would otherwise gain from the sale of its timber.[2] Plaintiffs assert, and

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[2] Defendants concede that the economic burden of the taxes falls at least in part on the Tribe, although the parties disagree as to the extent to which the burden is passed on to the Tribe. (Stipulation of Facts at 71-72).

defendants do not deny, that the day-to-day supervision of tribal timber on the Hoopa reservation by BIA is just as, if not more, extensive than in *White Mountain*. For example, the BIA established minimum stumpage bid prices, and both the federal government and the Tribe expend large sums each year for timber management and timber sales administration. Defendants concede that neither the State of California nor Humboldt County exercises any regulatory jurisdiction or management over tribal timber and that they expend no unreimbursed funds on tribal timber. (Stipulation of Facts at 55-56.)

Applying the analysis mandated in *White Mountain*, this court must conduct a particularized inquiry into the state, federal, and tribal interests at stake. The federal and tribal interests at issue are identical to those in *White Mountain*, and the ways in which the state tax would obstruct federal policies is also the same. Defendants argue that the tax here does not fall under *White Mountain* because it is not a tax on activity conducted on the reservation, but rather is on ownership of felled timber once title has transferred to a non-Indian. This is a distinction without a difference; the nature of the federal and tribal interests remains the same, as does the existence of a comprehensive federal scheme of regulation with which the state tax interferes.[3]

In fact, the impact on the federal regulatory scheme is even greater here than in *White Mountain* because the tax at issue is assessed against the very subject of the regulations—the Indian timber harvested on the reservation. Moreover, the value of the timber is produced entirely on the reservation. The Supreme Court has recently reaffirmed the importance of the concept that a tribe is entitled to the benefit, free of state taxation, of resources

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[3] Defendants' arguments that *White Mountain* is inapplicable because the private companies upon whom the tax is directly assessed conduct most of their business off the reservation and thus benefit from a full range of state and county services was rejected outright in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 843-44 & n. 9, 102 S.Ct. 3394, 3401-02 & n. 9, 73 L.Ed.2d 1174 (1982), as defendants concede. There is thus no need for the court to address this argument.

whose value is produced on the reservation. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57, 100 S.Ct. 2069, 2590-91, 65 L.Ed.2d 10 (1980). The tax here implicates, as did the tax in *White Mountain*, the Tribe's right to " 'receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . . ' " *White Mountain*, 448 U.S. at 149, 100 S.Ct. at 2586, *quoting* 25 C.F.R. § 141.3(a)(3) (1979). The fact that the tax does not attach until the timber is sold to a non-Indian does not result in a different analysis.

The state has two possible interests in the tax at issue: a regulatory interest and a revenue interest. The regulatory intent of the statute is clear. The legislative policy underlying the statute included encouraging "prudent and responsible forest resource management calculated to serve the public's need for timber and other forest products, while giving consideration to the public's need for watershed protection, fisheries and wildlife, and recreational opportunities alike in this and future generations." Cal.Rev. & Tax.Code § 38101, Historical Note, Section 1(c) (West 1979). It is clear, however, that the state can have no interest in regulating tribal timber. Faced with a similar situation, in which the state of Montana attempted to impose upon non-Indians who mined coal from Indian trust land a tax with comparable regulatory purposes, the Ninth Circuit concluded that "[t]his coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate. Such state action conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources." *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1114 (9th Cir.1981), *modified*, 665 F.2d 1390, *cert. denied*, 459 U.S. 916, 103 S.Ct. 230, 74 L.Ed.2d 182 (1982). Not only does the state have no legitimate regulatory interest in Indian timber, but the stated regulatory intent of the timber yield tax brings it into even greater conflict with the federal regulatory scheme than was the case in *White Mountain*. Imposition of the tax directly interferes with the comprehensive Federal timber management and timber sales administration.

The state's only real interest, then, is in collecting revenues. The justification proffered by the state for the burden imposed on the Tribe by this tax is that the state provides the Tribe with various valuable services. The Supreme Court has, however, made it clear what state benefits can justify a state tax burden on an Indian tribe. Such a burden will be upheld only if the tax revenue is used to aid the on-reservation activity which is being taxed.

The Supreme Court rejected precisely the same argument put forth by defendants here in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982). In that case the Court struck down a tax imposed by the state on the gross receipts received by a non-Indian construction company from a tribal school board for the construction of a school for Indian children on the reservation. The Court wrote:

> We are similarly unpersuaded by the State's argument that the significant services it provides to the Ramah Navajo Indians justify the imposition of this tax. The State does not suggest that these benefits are in any way related to the construction of schools on Indian land. Furthermore, the evidence introduced below by the State on this issue is far from clear. Although the State does provide services to the Ramah Navajo Indians, it receives federal funds for providing some of these services, and the State conceded at trial that it saves approximately $380,000 by not having to provide education for the Ramah Navajo children.

458 U.S. at 845 n. 10, 102 S.Ct. at 3402 n. 10.

Defendant's argument that the state in *Ramah Navajo* merely failed to prove that it provided significant services to the Indians is contradicted by the Supreme Court's subsequent decision in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. ____, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). There the Court, in enjoining the state from enforcing state game laws against non-Indians for acts done on the reservation, observed that the state had identified "no services it has performed in connection with hunting and fishing by nonmembers" which would justify a game license tax. The

Court concluded that the state's "general desire to obtain revenues is simply inadequate to justify the assertion of concurrent jurisdiction in this case." 462 U.S. ____, 103 S.Ct. at 2391.

Finally, the Ninth Circuit had come to the same conclusion even earlier. In *Crow Tribe v. Montana*, involving a state attempt to tax coal mined from Indian trust land, as discussed above, the court considered that one main purpose of the tax at issue was to preserve the value of the coal for future generations. In rejecting the state's attempt to impose a tax, the court concluded: "To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian coal, . . . the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land." 650 F.2d 1117 (cites omitted).[4]

In light of the Supreme Court's statements in *Ramah Navajo* and *Mescalero Apache Tribe*, and the Ninth Circuit's opinion in *Crow Tribe*, defendants cannot rely on general services provided to the Tribe to justify this tax.[5] Revenues from the timber yield tax go into a general fund and in no way support development of Indian timber. As noted above, the state has stipulated that it

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[4] Defendants' attempt to rely on *Crow Tribe* to support their own position is misplaced. The court's remark that "[a] tax carefully tailored to effectuate the state's legitimate interests might survive," 650 F.2d at 1114, was made in the context of detailed examples given by the court of governmental costs associated with the mining itself, which the state could have perhaps tried to recover through a tax tailored to *those costs*.

[5] Defendants argue that the Supreme Court in *White Mountain* "accepted" the state's taxation of the use of state highways within the reservation, and that because those tax revenues were not used to develop Indian timber, taxes on any on-reservation activity must be acceptable if other general services are provided. The short response to this argument is that the Supreme Court in *White Mountain* never addressed the state's taxation of state highway use at all. The Court clearly stated that for purposes of that action petitioners had conceded liability for taxes attributable to use of state highways within the reservation. 448 U.S. at 140 n. 6, 100 S.Ct. at 2582 n. 6. Those taxes were never challenged and were never at issue. No inference can be drawn from a matter which was not before the Court.

expends no reimbursed state funds with respect to timber or timber lands inside the reservation. Thus, the state's general interest in collecting revenue is insufficient when weighed against the federal and tribal interests at stake, under the *White Mountain* analysis.[6]

CONCLUSION

Having conducted the particularized inquiry into the nature of the state, federal, and tribal interests at stake as prescribed by the Supreme Court, the court finds that the exercise of state authority in assessing the timber yield tax against companies which purchase Tribal timber from BIA or from HTC or other Indian-owned firms is preempted by the pervasive federal regulation of Indian timber and is thus in violation of federal law.

Accordingly,

IT IS ORDERED that plaintiffs' motion for partial summary judgment be GRANTED and that defendants' motion for partial summary judgment be DENIED.

IT IS FURTHER ORDERED that the parties shall submit within thirty (30) days a joint statement as to the issues which remain to be resolved and how they intend to proceed with respect to any remaining issues. A status conference will be held in this matter on August 27 at 9:30 A.M.

ORDER

Plaintiffs and defendants in this action have proposed certain changes to the opinion issued by this court on July 6, 1984. Defendants have not opposed plaintiffs' proposed changes, all of which relate to technical points and make no substantive changes in the opinion.

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[6] The court notes defendants' argument that the county will have no incentive to provide services to the Tribe if the Tribe does not sufficiently contribute to revenues is contrary to a line of California cases beginning with *Serrano v. Priest*, 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 (1976). In light of the court's conclusion based on *White Mountain* and subsequent cases, the court need not reach this issue.

Defendants also propose two changes. They first propose that on p. 199, line 45, the words "The parties agreed at oral argument that" be deleted. The court has compared its own recollection with the transcript as read back by the reporter and finds that defendants' counsel stated at oral argument: "We will accept that the *Bracker* and *White Mountain* [sic] is the analysis that applies." The court therefore finds it inappropriate to modify the opinion in this respect.

Defendants' second proposed change is to delete the first two sentences of footnote 1, on page 200. Because the court found it clear that the case must be governed by *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), and further determined that the three Ninth Circuit decisions which defendants complain were not cited by plaintiffs were inapposite, it finds it inappropriate to modify the opinion in this respect, as well.

For these reasons, both of defendants' proposed changes are DENIED.

Defendants have further requested that the court certify this matter for an interlocutory appeal. However, the requirements for such certification under 28 U.S.C. § 1292(b) include that the district court "shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion . . . ." The court being of the opinion that the legal issues in this matter are clear and that there is not substantial ground for difference of opinion, the request that the court certify for interlocutory appeal is DENIED.

IT IS SO ORDERED.

Appendix C

The United States Constitution, Article VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . .

Appendix D

25 CFR Part 163—General Forest Regulations

§ 163.1 Definitions.

"Approval" means authorization by the Secretary, Area Director, Superintendent, tribe or individual Indian in accordance with appropriate delegations of authority.

"Commercial forest land" means Indian forest land capable of bearing merchantable forest products, currently or prospectively accessible, and not withdrawn from such use.

"Commercial forest resources" includes all the benefits derived by man from commercial forest lands such as forest products, soil productivity, water, fisheries, wildlife, recreation, aesthetic and other traditional values of the forest.

"Forest products" includes major forest resources such as lumber, lath, crating, ties, bolts, logs, bark, pulpwood, fuelwood, posts, Christmas trees, split products or other marketable materials authorized for removal.

"Forest protection" includes the protection of Indian forest resources from damages and losses by disease, insects, fire, animals (domestic and wild) and trespass. It also includes protection of wild lands from fire.

"Indian forest lands" means lands held in trust by the United States for Indian tribes, individual Indians, or Alaskan Natives or lands which are owned by such tribes and individuals subject to restrictions against alienation. Such lands are considered chiefly valuable for the production of forest products or to maintain watershed or other land values enhanced by a forest cover. A formal inspection and land classification action is not required before applying the provisions of this part to the management of any particular tract of land.

"Secretary" means the Secretary of the Interior or his/her authorized representative.

"Stumpage rate" means the stumpage value per thousand board feet or other unit of measure.

"Stumpage value" means the value of uncut timber as it stands in the woods.

"Sustained yield" means the yield of forest products that a forest can produce continuously at a given intensity of management.

§ 163.2 Scope and information collection.

(a) The regulations in this part are applicable to all Indian forest lands except as this part may be superseded by special legislation.

(b) The information collection requirements contained in §§ 163.6(a), 163.7(c)(2), 163.8(a), 163.9(a), 163.10(d), 163.14, 163.19(a), 163.19(d), and 163.23 have been approved by the Office of Management and Budget under 44 U.S.C. 3504(h) *et seq.* and assigned clearance number 1076-0080. The information is being collected to properly account for the resource. The information will be used to conduct program planning and management of timber resources. Response is required to obtain or retain a benefit.

§ 163.3 Objectives.

The following objectives apply to the management of Indian forest lands.

(a) The development, maintenance and enhancement of commercial forest lands in perpetually productive state by providing effective management and protection through the application of sound silvicultural and economic principles to the reforestation, growth and harvesting of timber and other forest products. This includes making adequate provision for new forest growth as the timber is removed.

(b) Regulation of the forest resources through the establishment and development of a timber sales program that is supported by written tribal objectives, and a long-range multiple use plan (as included in a forest management plan) that requires sound forest management practices.

(c) The regulation of the commercial forest in a manner which will insure method and order in harvesting the tree capital, so as

to make possible continuous production and a perpetual forest business.

(d) The development of Indian forests by Indian people to promote self-sustaining communities, so that Indians may receive from their own property not only the stumpage value, but also the benefit of whatever labor and profit it is capable of yielding.

(e) The sale of Indian timber on the open market, when the volume available and/or utilized for harvest is in excess of that which is being developed by the local Indian forest enterprise(s).

(f) The preservation of the forest in its natural state whenever the authorized Indian representatives determine that the recreational, cultural, aesthetic, or traditional values of the forest represent the highest and best use of the land to the Indians.

(g) The management and protection of forest resources to retain the beneficial effects of regulating water runoff and minimizing soil erosion.

(h) The management and protection of forest lands to maintain and/or improve timber production, soil productivity, grazing, wildlife, fisheries, recreation, aesthetic, cultural, and other traditional values of the forest to the extent that such action is in the best interest of the Indians.

§ 163.4 Sustained yield management.

To further the objectives enumerated in § 163.3, the timber harvest from Indian forest lands will not be authorized until practical methods of harvest, based on sound economic, silvicultural and other forest management principles, have been prescribed. Harvest schedules shall be directed toward achieving an approximate balance at the earliest practical time, between maximum net growth and harvest, and shall salvage timber that is deteriorating from fire damage, insect infestation, disease, overmaturity or other causes. On all Indian reservations with commercial forest lands, appropriate management and operating plans shall be prepared and revised as needed. Such documents will contain a statement defining the objectives sought and describing the manner in which the policies of the tribe and the Secretary will be applied to the forest, with a definite plan of

silvicultural management, analysis of the short-term and long-term effects of the plan, and a program of action, including a harvest schedule, for a specified period in the future.

§ 163.5 Cutting restrictions.

(a) Harvesting Indian timber will not be permitted unless provisions for natural and/or artificial forestation are included in planning the harvest.

(b) Clearing of large contiguous areas will be permitted only on lands that, when cleared, will be devoted to a more beneficial use than growing timber crops. This restriction shall not prohibit clearcutting when it is silviculturally good practice to harvest a particular stand of timber by such methods and conforms with § 163.3.

§ 163.6 Indian operations.

Indian tribal forest enterprises may be initiated and organized with consent of the authorized tribal representatives. Such enterprises may contract for the purchase of non-Indian owned forest products. Subject to approval by the Secretary the following actions may be taken:

(a) Authorized tribal enterprises may enter into formal agreements with tribal representatives for the use of tribal forest products, and with individual Indian owners for allotted forest products.

(b) Authorized officials of tribal enterprises, operating under approved agreements for the use of tribal or allotted forest products pursuant to this section, may sell the forest products produced according to generally accepted trade practices without compliance with § 3709 of the Revised Statutes.

(c) With the consent of the Indian owners, such enterprises may, without advertisement, contract for the purchase of forest products on Indian lands at stumpage rates authorized by the Secretary.

(d) Determination of and payment for stumpage and/or products utilized by such enterprises will be authorized in accordance

with § 163.15. However, the Secretary may issue special instructions for payment by methods other than those in § 163.15.

(e) Performance bonds may or may not be required in connection with operations on trust lands by such enterprises as determined by the Secretary.

§ 163.7 Timber sales from unallotted and allotted lands.

(a) If the volume of timber available for harvest on a reservation exceeds that being developed and/or utilized by local Indian forest enterprise(s) or individual Indians, open market sales of Indian timber may be authorized. This provision requires consent of the authorized representatives of the tribe for tribal timber, and the owners of a majority Indian interest in trust or restricted timber on allotted lands. Consent of the Secretary is required in all cases.

(b) On any Indian forest lands not formally designated for retention in its natural state by authorized Indian representatives, the Secretary may sell the timber from lands held under a trust or other patent containing restrictions on alienations without the consent of the owners when in his/her judgment such action is necessary to prevent loss of values resulting from fire, insects, diseases, windthrow or other catastrophes.

(c) Unless otherwise authorized by the Secretary, sales of timber from unallotted lands, allotted lands, or a combination of these two ownerships having a stumpage value exceeding $10,000 will not be approved until:

(1) An examination of the timber to be sold has been made by a forest officer, and

(2) A report setting forth all pertinent information has been submitted to the officer authorized to approve the contract as provided in § 163.13. In all such sales the timber shall be appraised and sold at stumpage rates not less than those established by the Secretary.

§ 163.8 Advertisement of sales.

Except as provided in §§ 163.6, 163.7, 163.9, and 163.19 sales of timber shall be made only after advertising.

(a) The advertisement shall be approved by the officer who will approve the contract. Advertised sales shall be made under sealed bids, or at public auction, or under a combination thereof. The advertisement may limit sales of Indian timber to Indian forest enterprises, members of the tribe, or may grant to Indian forest enterprises and/or members of the tribe who submitted bids the right to meet the higher bid of a non-member. If the estimated stumpage value of the timber offered does not exceed $10,000, the advertisement may be made by posters and circular letters. If the estimated stumpage value exceeds $10,000, the advertisement shall also be made in at least one edition of a newspaper of general circulation in the locality where the timber is situated. If the estimated stumpage value does not exceed $50,000, the advertisement shall be made for not less than 15 days; if the estimated stumpage value exceeds $50,000 but not $200,000, for not less than 30 days; and if the estimated stumpage value exceeds $200,000, for not less than 60 days.

(b) The approving officer may reduce the advertising period because of emergencies such as fire, insect attack, blowdown, limitation of time, or when there would be no practical advantage in advertising for the prescribed periods.

(c) If no contract is executed after such advertisement, the approving officer may, within one year from the last day on which bids were to be received as defined in the advertisement, permit the sale of such timber in the open market. The sale will be made upon the terms and conditions in the advertisement and at not less than the advertised value or the appraised value at the time of sale, whichever is greater.

§ 163.9 Timber sales without advertisement.

(a) Sales of timber may be made without advertisement to Indians or non-Indians with the consent of the authorized representatives of the tribe for tribal timber or with the consent of the owners of a majority Indian interest in trust or restricted timber on allotted lands, and the approval of the Secretary when:

(1) The timber is to be cut in conjunction with the granting of a right-of-way;

(2) Granting an authorized occupancy;

(3) It must be cut to protect the forest from injury;

(4) It is impractical to secure competition by formal advertising procedures; or

(5) Otherwise specifically authorized by statutes or regulations.

(b) The approving officer shall establish a documented record of each negotiated transaction. This will include:

(1) A written determination and finding that the transaction is of a type or class allowing the negotiation procedures or warranting departure from the procedures provided in § 163.8;

(2) The extent of solicitation and competition, or a statement of the facts upon which a finding of impracticability of securing competition is based; and

(3) A statement of the factors on which the award is based, including a determination as to the reasonability of the price accepted.

(c) This section shall not serve to impede the use of § 163.6 as approved by the Secretary.

§ 163.10 Deposit with bid.

(a) A deposit shall be made with each proposal for the purchase of either allotted or unallotted Indian timber. Such deposits shall be at least:

(1) Ten (10) percent if the appraised stumpage value is less than $100,000 and in any event not less than $1,000 or full value whichever is less;

(2) Five (5) percent if the appraised stumpage value is $100,000 to $250,000 but in any event not less than $10,000.

(3) Three (3) percent if the appraised stumpage value exceeds $250,000 but in any event not less than $12,500.

(b) Deposits shall be in the form of either a certified check, cashier's check, bank draft, postal money order, or irrevocable

letter-of-credit, drawn payable to the order of the Bureau of Indian Affairs, or in cash.

(c) The deposit of the apparent high bidder, and of others who submit written request to have their bids considered for acceptance will be retained pending acceptance or rejection of the bids. All other deposits will be returned following the opening and posting of bids.

(d) The deposit of the successful bidder will be retained if the bidder does not:

(1) Furnish the performance bond required by § 163.14 within the time stipulated in the advertisement of timber sale.

(2) Execute the contract, or

(3) Perform the contract.

(e) This section does not limit or waive any further damages available under applicable law or the terms of the contract.

§ 163.11 Acceptance and rejection of bids.

(a) Applicants or bidders may be Indian forest enterprises, members of the tribe, individuals, associations of individuals, partnerships, or corporations. The high bid received in accordance with any advertisement issued under authority of this part shall be accepted, except that the approving officer, having set forth the reason(s) in writing, shall have the right to reject the high bid if:

(1) The high bidder is considered unqualified to fulfill the contractual requirement of the advertisement, or

(2) There are reasonable grounds to consider it in the interest of the Indians to reject the high bid.

(b) If the high bid is rejected, the approving officer may authorize:

(1) Rejection of all bids, or

(2) Acceptance of the offer of another bidder who, at bid opening, makes written request that their bid and bid deposit be held pending a bid acceptance.

(c) The officer authorized to accept the bid shall have the discretion to waive minor technical defects in advertisements and proposals, such as typographical errors and misplaced entries on forms that do not affect clarity, value or money deposits.

§ 163.12 Contracts required.

Except as provided in § 163.19, in sales of timber with an appraised stumpage value exceeding $10,000, the contract forms approved by the Secretary must be used unless a special form for a particular sale or class of sales is approved by the Secretary. Essential departures from the fundamental requirements of standard and approved contract forms shall be made only with the approval of the Secretary. Unless otherwise directed, the contracts shall require that the proceeds be paid by remittance drawn to the Bureau of Indian Affairs and transmitted to the Superintendent. By mutual agreement, contracts may be extended, modified, or assigned subject to approval of the approving officer, and may be terminated by the approving officer upon completion or by mutual agreement.

§ 163.13 Execution and approval of contracts.

(a) All contracts for the sale of tribal timber shall be executed by the authorized tribal representative(s). Contracts must be approved by the Secretary to be valid. There shall be included with the contract, an affidavit executed by the appropriate tribal representative(s) setting forth the resolution or other authority of the governing body of the tribe authorizing the sale.

(b) Contracts for the sale of allotted timber shall be executed by the Indian owners or the Secretary acting pursuant to a power of attorney from the Indian owner, subject to conditions set forth in §§ 163.7 and 163.13(b)(1), (2), and (3). Contracts must be approved by the Secretary to be valid.

(1) The Secretary may, after consultation with any legally appointed guardian, execute contracts on behalf of minors and Indian owners who are non compos mentis.

(2) The Secretary may execute contracts for those persons whose ownership in a decedent's estate has not been determined

or for those persons who cannot be located after a reasonable and diligent search and the giving of notice by publication.

(3) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary may include such unrestricted interest in a sale of the trust or restricted interests in the timber, pursuant to this part, and perform any functions required of him/her by the contract of sale for both the restricted and the unrestricted interests, including the collection and disbursement of payments for timber and the deductions as service fees from such payments of sums in lieu of administrative expenses.

§ 163.14 Bonds required.

Performance bonds will be required in connection with all sales of Indian timber, except they may or may not be required, as determined by the approving officer, in connection with the use of timber by tribal enterprises pursuant to § 163.6 or in timber cutting permits issued pursuant to §163.19. In sales in which the estimated stumpage value, calculated at the appraised stumpage rates, does not exceed $10,000, the bond shall be at least 20 percent of the estimated stumpage value. In sales in which the estimated stumpage value exceeds $10,000 but is not over $100,000, the bond shall be at least 15 percent of the estimated stumpage value but not less than $2,000; in sales in which the estimated stumpage value exceeds $100,000, but is not over $250,000, the bond shall be at least 10 percent of the estimated stumpage value but not less than $15,000; and in sales in which the estimated stumpage value exceeds $250,000, the bond shall be at least 5 percent of the estimated stumpage value but not less than $25,000. Bonds shall be in a form acceptable to the approving officer and may include a corporate surety bond by an acceptable surety company; or cash bond designating the approving officer to act under a power of attorney; or negotiable United States Government securities supported by appropriate power of attorney; or an irrevocable letter-of-credit.

§ 163.15 Payment for timber.

(a) The basis of volume determination for timber sold shall be the Scribner Decimal C log rules, cubic volume, lineal measure-

ment, piece count, weight, or such other form of measurement as the Secretary may authorize for use. With the exception of tribal enterprises pursuant to § 163.6, payment for timber will be required in advance of cutting.

(b) Methods of payment include advance payments, installment payments and advance deposits as specified in timber contract documents. Each advance deposit shall be at least 10 percent of the value of the minimum volume of timber required to be cut annually, figured at the appraised stumpage rates: *Provided*, that the approving officer may reduce the size of the last advance deposit before the completion of the sale or before periods of approximately three months or longer during which no timber cutting is anticipated. If a contract stipulates no minimum annual cutting requirements, the amount of each advance deposit shall be determined by the approving officer. The advance payments that may be required in the sale of trust timber, pursuant to § 163.16, shall not operate to reduce the size of advance deposits required by this section.

§ 163.16 Advance payment for allotment timber.

(a) Unless otherwise authorized by the Secretary, and except in the case of lump sum (predetermined volume) sales, contracts for the sale of timber from Indian forest lands shall provide for the payment of up to 25 percent of the stumpage value, calculated at the bid price, within 30 days from the date of approval and before cutting begins. Additional advance payments may be specified in contracts that are more than three years in duration. However, no advance payment will be required that would make the sum of such payment and of advance deposits and advance payments previously applied against timber cut from each appropriate ownership exceed 50 percent of the bid stumpage value. For each appropriate ownership, advance payments shall be credited against the timber as it is cut and scaled at the stumpage rates governing at the time of scaling.

(b) Terms and conditions for payment of timber under lump sum sales shall be specified in timber contract documents. Advance payments are not refundable.

§ 163.17 Time for cutting timber.

Unless otherwise authorized by the Secretary, the maximum period which shall be allowed, after the effective date of a timber contract, for harvesting the estimated volume of timber purchased shall be five years.

§ 163.18 Deductions for administrative expenses.

In sales of forest products from Indian forest lands, a reasonable deduction shall be made from the gross proceeds to cover in whole or in part the cost of managing and protecting the forest lands. Such costs will include the cost of sale administration, and forest regeneration. However, such deductions are not intended to cover the costs that are paid from funds appropriated specifically for fire suppression or forest pest control. Unless special instructions have been given by the Secretary as to the amount of the deduction, or the manner in which it is to be made, the deduction shall be 10% of the gross amount received for timber sold. Service fees in lieu of administrative deductions shall be determined in a similar manner.

§ 163.19 Timber cutting permits.

(a) Except as provided in §§ 163.6 and 163.20, all cutting of forest products that is not done under formal contract, pursuant to § 163.12, shall be done under timber cutting permit forms approved by the Secretary. Permits will be issued only with the written consent of the Indian owner(s) or the Secretary, for allotted lands, as authorized in § 163.13. To be valid, permits must be approved by the Secretary. Such consents to the issuance of cutting permits shall stipulate the minimum product rate at which timber may be sold under permit. Payment and bonding requirements will be stipulated in the permit document as appropriate.

(b) Free-use cutting permits may be issued for specified species and types of forest products. Timber cut under this authority may be limited as to sale or exchange for other goods or services. The stumpage value which may be cut in a fiscal year by any individual under this authority shall not exceed $2,500. Individual

shall mean an individual or any operating entity comprised of several individuals.

(c) Paid permits subject to deductions for administrative expenses, as provided in § 163.18, may be issued. Unless otherwise authorized by the Secretary, the stumpage value which may be cut under paid permits in a fiscal year by any individual under this authority shall not exceed $10,000. This paragraph (c) does not apply to special allotment timber cutting permits. Individual shall mean an individual or any operating entity comprised of several individuals.

(d) An Indian having sole beneficial interest in an allotment may be issued an approved form of special permit to cut and sell designated timber from such allotment. The special permit shall include provision for payment by the Indian of administrative expenses pursuant to § 163.18. Unless waived by the Secretary, the permit shall also require the Indian to make a deposit with the Secretary to be returned to the Indian upon satisfactory completion of the permit or to be used by the Secretary in his/her discretion for planting or other work to offset damage to the land or the timber caused by failure to comply with the provisions of the permit. As a condition to granting a special permit under authority of this paragraph, the Indian may be required to provide evidence acceptable to the Secretary that he/she has arranged a bona fide sale of the timber to be cut, on terms that will protect the Indian's interest.

§ 163.20 Free-use cutting without permits.

With the consent of the Indian owners and the Secretary, Indians may cut designated types of forest products from Indian forest lands without a permit or contract, and without charge. Timber cut under this authority shall be for the Indian's personal use, and shall not be sold or exchanged for other goods or services.

§ 163.21 Fire management measures.

(a) The Secretary is authorized to maintain facilities and staff, hire temporary labor, rent fire fighting equipment, purchase tools and supplies, and pay for their transportation as needed, to maintain an adequate level of readiness to meet normal wildfire protection needs and extinguish forest or range fires on Indian reservations or other Indian trust lands. No expenses for fighting a fire outside a reservation may be incurred unless the fire threatens the reservation or other Indian trust lands or unless such expenses are incurred pursuant to an approved cooperative agreement with another protection agency. The rates of pay for fire fighters and for equipment rental shall be the rates for such fire fighting services that are currently in use by public and private wildfire protection agencies adjacent to Indian reservations on which a fire occurs, unless there are in effect at the time different rates that have been approved by the Secretary. The Secretary may also enter into reciprocal agreements with any fire organization maintaining protection facilities in the vicinity of Indian reservations or other Indian trust lands for mutual aid in wildfire protection. This section does not apply to the rendering of emergency aid, or agreements for mutual aid in fire protection pursuant to the Act of May 27, 1955 (69 Stat. 66).

(b) The Secretary will conduct a wildfire prevention program to reduce the number of person-caused fires on Indian reservations or other Indian trust lands.

(c) The Secretary is authorized to expend funds for emergency rehabilitation measures needed to stabilize soil and watershed on Indian reservations or other Indian trust lands damaged by wildfire.

(d) Upon consultation with the Indian landowners, the Secretary may use fire as a management tool on Indian reservations to achieve land or resource management objectives.

§ 163.22 Trespass.

(a) In addition to liability for trespass on Indian lands, as indicated in this part, persons responsible for such trespass may

be prosecuted criminally under any applicable federal law. Penalties are prescribed by the following statutes:

(1) Timber trespass (18 U.S.C. 1853).

(2) Fire trespass (18 U.S.C. 1855, 1856). Tribal ordinances may apply where appropriate.

(b) The extraction, severance, injury or removal of forest products from Indian lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States and the Indian owners, and will be subject to prosecution for such unlawful acts.

(c) The rule of damages to be applied in cases of timber and other trespass will be the measure of damages prescribed by the laws of the State in which the trespass is committed, unless by federal law a different rule is prescribed or authorized.

(d) The Secretary may identify and forbid the removal of forest products from restricted or trust Indian lands or direct their removal to a point of safekeeping when there is reason to believe that such products were unlawfully cut. Any such forest products that can be positively identified as Indian trust property should be sold to prevent their deterioration. When any forest products cut in trespass are found to be removed to land not under Government supervision, the owner of the land should be notified that such products are Indian trust property and any further action should be upon advice of the Office of the Solicitor of the Department of the Interior. Any forest products sold under this § 163.22 may be disposed of under the provisions of this part, insofar as they are applicable. The Secretary may accept payment of damages in full in the settlement of civil trespass cases without resort to court action. The Secretary may also accept a recommended settlement per Solicitor's Regulations Manual I.4.1 when exercised in accordance with Departmental procedures contained in 344 DM 3. All other matters relating to the collection of debts under this section will be in accordance with departmental Manual, Part 344.

(e) The Secretary will provide for timely action on any reports of trespass on Indian trust lands including pending Native allotments (25 U.S.C. 9).

§ 163.23 Revocable road use and construction permits for removal of commercial forest products.

(a) The Secretary may request tribes and/or all other trust landowners to sign landowners revocable permits designating the Secretary as Agent for the landowner and empowering him/her to issue revocable road use and construction permits to users for the purpose of removing commercial forest products.

(b) When a majority of trust interest in a tract has consented, the Secretary may issue revocable road use and construction permits for removal of commercial forest products over and across individually owned lands. In addition, the Secretary may act for individual owners when:

(1) The individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant, in total or for an interest therein, will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages;

(2) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known or majority thereof, consent to the grant;

(3) The heirs or devisees of a deceased owner of the land or interest therein have not been determined, and the Secretary finds the grant will cause no substantial injury to the land or any owner thereof, provided that once the heirs or devisees of the deceased owner are determined, their consent is obtained.

(c) Nothing in this section shall preclude acquisition of rights-of-way for roads, Subchapter H, Part 169, 25 CFR, or conflict with provisions of that part.

§ 163.24 Insect and disease control.

(a) The Secretary is authorized to protect and preserve from disease, or the ravages of beetles, or other insects, timber on

Indian reservations or other Indian lands under the jurisdiction of the Department of the Interior. (Sept. 20, 1922, Ch. 349, 42 Stat. 857). The Secretary shall consult with authorized tribal representatives or owners of other Indian lands concerning control actions.

(b) The Secretary is responsible to control and mitigate harmful effects of insects and diseases on Indian forest lands. The Secretary will coordinate this control with the Secretary of Agriculture in accordance with Section 5, Pub. L. 95-313, July 1, 1978, 92 Stat. 336.

§ 163.25 Forest development.

This section pertains to that segment of the forestry program which addresses the improvement of timber resources. The program shall consist of forestation, timber stand improvement work, and related investments that enhance productivity. It shall be conducted with emphasis on on-site activities. Forest development funds will be used to establish, re-establish, maintain, and/or improve growth of desirable commercial timber species and stocking level. Forest development activities will be planned and executed using cost/benefit analyses as one of the determinants in establishing priorities.

§ 163.26 Appeals under timber contracts and permits.

Any action taken by an approving officer exercising delegated authority from the Secretary of the Interior or by a subordinate official of the Department of the Interior exercising an authority by the terms of the contract may be appealed. Such appeal shall not stay any action under the contract unless otherwise directed by the Secretary of the Interior. Such appeals shall be filed in accordance with the provision of 25 CFR Part 2, appeals from Administrative Actions, or any other applicable general regulations covering appeals. Appropriate Indian representatives shall be notified upon receipt of an appeal initiated by the purchaser. Likewise, the purchaser shall be notified upon receipt of an appeal initiated by the seller.

§ 163.27 Environmental protection.

Before implementing these regulations, forestry personnel will review their timber sale activities for potential environmental impacts in accordance with the National Environmental Policy Act (NEPA) of 1969 and applicable Council on Environmental Quality Regulations (40 CFR 1500-1508). NEPA compliance is further explained in Departmental Manual Part 516 DM (Environmental Quality) and 30 BIAM Supplement 1 (NEPA Handbook) of the Bureau of Indian Affairs, from which specific guidance is obtained.

Appendix E

The California Forest Taxation Reform Act (Cal.Rev. and Tax.Code sections 38101 et seq.)

§ 38101. Short title

This part is known and may be cited as the "Timber Yield Tax Law."

§ 38103. Timber

"Timber" means trees of any species maintained for eventual harvest for forest products purposes, whether planted or of natural growth, standing or down, including Christmas trees, on privately or publicly owned land, but does not mean nursery stock.

§ 38103.1. Timberland

"Timberland" means privately or publicly owned land which is devoted to and used for growing and harvesting timber, or for growing and harvesting timber and compatible uses, and which is capable of growing an average annual volume of wood fiber of at least 15 cubic feet per acre.

§ 38104. Timber owner

"Timber owner" means any person who owns timber immediately prior to felling or the first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other person or agency or entity exempt from property taxation under the Constitution or laws of the United States or under the Constitution or laws of the State of California. "Timber owner" includes any person who owns or acquires legal title or beneficial title to downed timber in this state.

§ 38115. Rate

A timber yield tax is hereby imposed on every timber owner who harvests his timber or causes it to be harvested on or after April 1, 1977, and on every timber owner of felled or downed timber who acquires title to such felled or downed timber in this state from an exempt person or agency described in Section 38104

on or after that date, at the rate of 6 percent of the total immediate harvest value of that timber or at such other rate as may be fixed pursuant to Chapter 3 (commencing with Section 38202) of this part. The immediate harvest value shall be determined as of the scaling date.

§ 38202. Adjustment of yield tax rate; computation

During December, 1978, and December of each subsequent year, after public hearings, the board shall adjust the yield tax rate to the nearest one-tenth of 1 percent in the same proportion that the average rate of general property taxation in the rate adjustment counties in the current tax year differs from the average rate of general property taxation in the rate adjustment counties in the preceding tax year. The board shall compute the average rate of general property taxation in the rate adjustment counties by (a) adding the county, city, school district, and other general taxes, but not the special taxes on intangibles, aircraft, baled cotton or any other property, which is subject to a uniform statewide tax rate, nor special assessments, and (b) dividing the amount obtained by the total assessed valuation in the rate adjustment counties, exclusive of the homeowners' and business inventory exemptions, as shown by the county tax rolls for the same year.

"Total assessed valuation," as used in this section, does not include the assessment of property which is subject to a uniform statewide tax rate.

"Special assessment" as used in this section, means any amount levied solely against land or land and improvements.

§ 38301. Imposition; rate

A timber reserve fund tax is hereby imposed on every timber owner who harvests his timber or causes it to be harvested on and after April 1, 1977, to and including December 31, 1982, and every timber owner of felled or downed timber who acquires title during that period to such felled or downed timber in this state from an exempt person or agency described in Section 38104, at the rate of 0.5 percent of the total immediate harvest value of that timber, or at such other rate as may be fixed pursuant to

Section 38303. This tax is in addition to the tax imposed by Section 38115. The immediate harvest value shall be determined as of the scaling date.

§ 38351. Necessity; requirements

Every person who owns timber subject to a timber harvest plan, every person who is required to file a notice of timber operations with the State Forester, and every person who is the first person who acquires either legal title or beneficial title to downed timber or timber after it has been felled from land owned by a federal agency or any other person or agency entity exempt from state taxation under the Constitution or laws of the United States or under the Constitution or laws of the State of California shall register with the board giving such information as the board may require.

§ 38901. Remittances; deposit

All taxes, interest and penalties imposed and all amounts of tax required to be paid under this part shall be made in remittances to the State Board of Equalization and shall be deposited in the State Treasury as provided in this chapter.

§ 38903. Timber tax refund; creation; deposits

(a) All taxes, interest, penalties and other amounts paid or collected pursuant to this part on or before July 31, 1983, except taxes paid or collected pursuant to Section 38301, shall be deposited in the Timber Tax Fund, which is hereby created.

(b) On and after August 1, 1983, all taxes, interest, penalties, and other amounts paid or collected pursuant to this part shall be deposited in the Timber Tax Fund.

(Amended by Stats.1982, c. 1058, p. 3830, § 4; Stats.1983, c. 1281, § 47, eff. Sept. 30, 1983.)

§ 38903.1. Repealed by Stats.1984, c. 678, § 43

§ 38904. Timber tax fund; appropriation; uses

The money in the Timber Tax Fund is appropriated as follows:

(a) To reimburse the General Fund for funds advanced for costs incurred by the board in administration of this part as follows:

(1) Four hundred sixty-seven thousand nine hundred thirty dollars ($467,930) for fiscal years 1975-76 and 1976-77.

(2) Amounts identified and approved in subsequent fiscal years as approved in the Budget Bill. One-half of this amount shall be reimbursed to the General Fund on November 30, and the remaining one-half on May 31. In the event that not all funds approved in the Budget Bill are actually expended by the board, then in the succeeding fiscal year, the amount to be reimbursed to the General Fund on November 30 shall be reduced by an amount equal to the unexpended appropriation of the preceding fiscal year.

(b) To reimburse the General Fund for funds advanced for costs incurred by the State Forester in administration of Section 4582.8 of the Public Resources Code as follows:

(1) Thirteen thousand five hundred dollars ($13,500) for fiscal years 1975-76 and 1976-77.

(2) Amounts identified and approved in subsequent fiscal years as approved in the Budget Bill.

(c) To the Controller to allocate pursuant to Sections 38905 and 38905.1.

(d) To pay refunds authorized by this part of taxes imposed pursuant to Section 38115 and interest, penalties, and other amounts paid or collected pursuant to this part and deposited in the Timber Tax Fund.

§ 38905.1. Timber tax fund; transmittal to county treasurers; distribution; legislative intent

(a) Commencing with the 1983-84 fiscal year, the Controller shall, pursuant to subdivision (c) of Section 38904, on November 30 and May 31 of each fiscal year, transmit to county treasurers the balance in the Timber Tax Fund on those dates, in accordance with the following allocation schedule:

(1) For the 1983-84 fiscal year, 50 percent of the balance in Timber Tax Fund shall be transmitted to county treasurers based on the annual yield tax revenue guarantee certified for each county pursuant to subdivision (c) or (e) of Section 27423 of the Government Code. The remaining 50 percent of the balance in the fund shall be transmitted to county treasurers in the same proportion that the balance to be transmitted was generated from each county, as certified by the State Board of Equalization.

(2) For the 1984-85 fiscal year and each fiscal year thereafter, 100 percent of the balance in the fund shall be transmitted to county treasurers in the same proportion that the balance to be transmitted was generated from each county, as certified by the State Board of Equalization.

(b) Upon receipt of funds pursuant to subdivision (a), the county auditor shall within 10 days distribute the funds among the jurisdictions (as defined in Section 95) within the county in the same proportion that each jurisdiction's minimum revenue guarantee, determined pursuant to Section 27423 of the Government Code, bears to the total of all those amounts for all jurisdictions within the county.

(c) It is the intent of the Legislature that the provisions of subdivision (a) shall provide a final and conclusive disposition of the problem of allocating yield tax revenues among counties entitled to those revenues.

§ 38908. Expenditure of allocated funds by local entities

Local governmental entities which are allocated funds pursuant to Section 38905 or * * * 38905.1 may expend such funds without restriction.

Supreme Court, U.S.
FILED
JAN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-686

IN THE

Supreme Court of the United States

October Term, 1989

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBERG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION AND STATE OF CALIFORNIA,
Petitioners,

vs.

HOOPA VALLEY TRIBE AND HOOPA VALLEY TIMBER CORPORATION
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the lower courts properly conclude that California may not impose a tax on the value of timber harvested from tribal trust land on the Hoopa Valley Reservation in light of the comprehensive federal regulation of timber management on Indian reservations?

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No. 89-686

IN THE SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1989

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBERG, WILLIAM BENNETT, KENNETH CORY, CALIFORNIA STATE BOARD OF EQUALIZATION AND STATE OF CALIFORNIA,
Petitioners,

vs.

HOOPA VALLEY TRIBE AND HOOPA VALLEY TIMBER CORPORATION
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

On November 17, 1989 respondents Hoopa Valley Tribe, et al., waived the right to file a brief in opposition and suggested summary affirmance, the disposition of one of the cases relied upon below, Crow Tribe of Indians v. Montana, 484 U.S. 997 (1988). On November 29, 1989 respondents cross-petitioned for certiorari in No. 89-890

regarding the lower court's denial of attorney's fees, pursuant to Sup. Ct. R. 19.5. Now, pursuant to the Clerk's letter of December 6, 1989, the Hoopa Valley Tribe, et al., respond in opposition to the petition for certiorari in No. 89-686.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provision cited in the petition this case involves 25 U.S.C. § 407 (Supp. 1989) which provides:

> § 407. Sale of timber on unallotted lands.
>
> Under regulations prescribed by the Secretary of the Interior, the timber on unallotted trust land in Indian reservations or on other land held in trust for tribes may be sold in accordance with the principles of sustained-yield management or to convert the land to a more desirable use. After deduction, if any, for administrative expenses under section 413 of this title, the proceeds of sale shall be used --
>
> (1) as determined by the governing bodies of the tribes concerned and approved by the Secretary, or
>
> (2) in the absence of such a governing body, as determined by the Secretary for the tribe concerned.

STATEMENT OF CASE

The Hoopa Valley Reservation[1]/ is located in rugged mountainous country in the northwest corner of California, the ancestral home of the Hoopa Valley Indian Tribe. A15-16; A19.[2]/ Both Indians and non-Indians residing on Reservation are eligible for government services provided by the Hoopa Valley Tribe and federal agencies, with few exceptions. The record below contains a stipulation thoroughly analyzing the services provided to individuals on the Reservation. This shows that tribal and federal funding for those services in 1983 was approximately $7.37 million.[3]/ The proportion of services funded by the State of California and local non-Indian governments is almost exactly equal to

---

[1]/ Pursuant to the Hoopa Yurok Settlement Act, the portion of the former Hoopa Valley Reservation called "the Square" below was, with immaterial modifications, redefined as the entire Hoopa Valley Reservation, see 25 U.S.C. § 1300i-1 (Supp. 1989); 53 Fed. Reg. 49361 (December 7, 1988).

[2]/ The parties' stipulation of facts which constitutes the factual record in this action is reproduced in the appendix at A1-67. See Pet. at 2, n.1.

[3]/ Petitioners' statement that the 1983 cost of services provided by the state and local non-Indian governments totaled approximately $4.75 million is apparently calculated from the parties' stipulation. See A31-53 concerning state, federal and tribal interests and services regarding land, population, roads, busses, fire protection, schools, law enforcement, welfare, mental health, hospital and medical, solid waste, airport, radio, public utilities, housing, recreation, economic development and services relating to Indian timber.

the non-Indian fraction of the population of the Reservation -- 39%. See A31-53.

"Neither the State of California nor Humboldt County exercise any regulatory jurisdiction or management responsibility over timber on trust land within the Hoopa Valley Reservation. . . . .[T]he State does not expend any unreimbursed state funds with respect to timber or timberlands inside the Reservation." A53. By contrast, both the Tribe and the Bureau of Indian Affairs (BIA) expend substantial sums on Reservation forestry management, totaling some $1,747,000 in 1982. See A25-26. Under strict BIA supervision, those contracting with the United States to commercially harvest tribal timber construct logging roads, protect streams, dispose of slash and provide for reforestation. A24. However, on a sustained yield basis, the volume of timber produced from the Reservation is insufficient to support a tribally-owned sawmill. A62. Instead, timber is harvested by the tribal timber corporation or by a variety of Indian and non-Indian businesses. Under various federal contracts these enterprises cut the trees, manufacture the felled timber into several grades of logs, and haul them to sawmills located off the Reservation. See A3-10; A60-63.

The California timber yield tax overturned below is, "in effect . . . a state property tax collected on the state level that parallels and replaces annual county ad valorem taxes on standing timber." A27. The ad valorem property tax was not previously applied to the tribal land or the standing timber on that land. Id. "Revenues collected on Hoopa tribal timber" exceeded $800,000 in 1977-82. A57. The timber yield tax, normally imposed on timber owners only, is also collected from persons who purchase timber or logs from the BIA or the Hoopa Timber Corporation; nevertheless the effect of standard industry practices is that

the timber owner bears the economic burden of the tax. A30, A66-67.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT'S RULING, THE FIRST CASE FOLLOWING COTTON PETROLEUM CORP. V. NEW MEXICO, PRESENTS NOTHING WARRANTING CERTIORARI UNDER SUP. CT. R. 17.1.

The petition does not mention any of the grounds ordinarily considered by the Court in granting certiorari. Even if it were true that "White Mountain Apache Tribe v. Bracker and Ramah Navajo School Board v. Board of Revenue are distinguishable," Pet. at 4, which as explained below it is not, such a showing falls short of a "conflict with applicable decisions of this Court," required by Sup. Ct. R. 17.1(c). Conflicts "must be both direct and apparent." R. Gressman, et al., Supreme Court Practice 202 (6th ed. 1986). Nor do petitioners suggest that the lower court misapplied Cotton Petroleum Corp. v. New Mexico, ___ U.S. ___, 109 S. Ct. 1698 (1989). Review of this lower court decision, particularly since it is the very first case to apply Cotton Petroleum, is plainly unwarranted.

Cotton Petroleum was decided on April 25, 1989, just over ninety days before the lower court's opinion here. This Court described Cotton Petroleum as "a sequel to Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)" to consider New Mexico severance taxes on reservation oil and gas production by non-Indian lessees. ___ U.S. ___, 109 S. Ct. at 1702. When the Court noted probable jurisdiction over Cotton Petroleum's argument stemming from a pregnant footnote in Merrion, it also invited the parties to brief a Commerce Clause tax apportionment issue. ___ U.S. ___, 109 S. Ct. at 1703, 1705. Nothing in Cotton Petroleum

suggests that the Court left open an important and undecided question of standards that define which state taxes of Indian reservation activities are pre-empted by federal law. Instead, both the Court in Cotton Petroleum and the lower court here applied to the facts before them "the special sense in which the doctrine of pre-emption is applied in this context." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983) (citing Ramah Navajo School Board, 458 U.S. 832, 838 (1982)). As a result, there is no dispute here as to the balancing test used by this Court.

This case turns on the preemptive effect of the federal tribal timber statutes, including 25 U.S.C. § 407, and the General Forest Regulations, 25 C.F.R. Part 163, Pet. App. A27-39.[4]/ This Court extensively analyzed those provisions in the context of different taxes and different parties in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), and also examined them in United States v. Mitchell, 463 U.S. 206 (1983). Thus this case presents no important new statutory scheme justifying review. Instead, petitioners conveniently ignore the constitutional requirement that citizens within a state's border be provided services on a non-discriminatory basis[5]/ and focus solely on

---

[4]/ Unless otherwise indicated, all references to "Pet. App." are to the Appendix to the Petition for Writ of Certiorari in No. 89-686.

[5]/ State attempts to deny rights or benefits to Indians on the ground that they do not bear many of the tax burdens supporting state services have routinely been rejected since Indians became citizens in 1924, see 8 U.S.C. § 140(b). E.g., Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P.2d 92 (1954); Prince v. Board of Education, 88 N.M. 548, 543 P.2d 1176 (1975); Montoya v. Bolack, 70

the fact that state revenue needs are considered in the "particularized inquiry into the nature of the state, federal, and tribal interests at stake." Bracker, supra, 448 U.S. at 145. Accordingly, petitioner here seeks to abandon the Court's balancing of interests in favor of a broad rule permitting state taxation of revenues generated on Indian reservations if individuals receive state services. But as this Court also pointed out in Cotton Petroleum: "A tax is not an assessment of benefits." ___ U.S. ___, 109 S. Ct. at 1715 (quoting Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987)). In short, neither the procedural history of this case, the timing, nor the legal principles involved suggest the existence of grounds warranting certiorari.

II. THE LOWER COURT CORRECTLY VIEWED THIS CASE AS A GARDEN VARIETY APPLICATION OF THE SPECIAL FEDERAL PREEMPTION PRINCIPLES USED IN THIS AREA OF LAW

The lower court correctly recognized the special sense in which the doctrine of federal preemption is applied to assertions of state authority over non-members on an Indian reservation:

> Preemption analysis in Indian tribal cases "requires a particularized examination of

---

N.M. 196, 372 P.2d 387 (1962). See also Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 476 (1976); McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 173 n.12 (1973); Board of County Comm'rs v. Seber, 318 U.S. 705, 718 (1943); The Kansas Indians, 72 U.S. (5 Wall.) 737, 758 (1867).

> the relevant state, federal, and tribal interests." Cotton Petroleum Corp. v. New Mexico, 109 S. Ct. 1698, 1707 (1989) (quoting Ramah Navajo School Board v. Board of Revenue, 458 U.S. 832, 838 (1982)). The question of whether federal law, which reflects related federal and tribal interests, preempts state activity is not controlled by the standards of preemption developed in other areas. Id.

Pet. App. A-7, 881 F.2d at 659. Here the lower court conducted just that particularized examination and concluded that the balancing test did not favor California. The state conceded that it had no regulatory interest whatsoever in the management or harvesting of Indian trust timber on the Reservation. The court also found "no direct connection between revenues from the timber yield tax and the provision of services to tribal members or area residents generally." Pet. App. A-11, 881 F.2d at 661.

The federal interests here are found in precisely the same statutes and regulations that were construed by the Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148-51 (1980). Then-Justice Rehnquist, dissenting in Ramah Navajo, supra, 458 U.S. at 850-51, stressed the comprehensiveness of the federal timber regulations. In Bracker the Court concluded that the state tax would obstruct federal policies in three areas: (1) threaten the disposition of profits; (2) undermine the Secretary's flexibility in setting terms of timber harvesting contracts; and (3) adversely affect the Tribe's ability to comply with the sustained yield requirement policies of federal law. Here,

the state tax on timber yields has precisely the same obstructive effects. It is undisputed that the Tribe, as timber owner, bears the burden of the tax. A66-67. The non-Indian companies harvesting tribal timber operate under precisely the same contracts and regulations of the Bureau of Indian Affairs involved in Bracker. Tribal revenues, derived principally from timber income, provide indispensable funds for timber management and reforestation. A24-26; A60-66. Also, as in Bracker, the tribe primarily depends on the tribal timber revenues to fund government services to members and non-Indians on the Reservation. A16-22.

Petitioners' enthusiastic attempt to distinguish this Court's opinions in Bracker and Ramah Navajo School Board simply misstates those cases. Those cases did not turn upon a complete lack of state services to the reservations at issue but upon a lack of a state role in the activity subject to tax. To the contrary, in Bracker, it was conceded that the state regulated and could tax highways on the Reservation which it maintained and which benefitted the Tribe. And, no doubt, the State of Arizona provided a wide variety of services to both Indian and non-Indian residents of the Reservation. Instead the issue in Bracker concerned the state's attempt to tax non-Indian loggers' use of roads which the state had not built and did not maintain. There, like here, the state had no regulatory role in harvesting trust timber.

Similarly, in Ramah Navajo School Board the state provided many services to Reservation residents, but it could point to no regulatory involvement in school construction that would warrant imposition of taxes on the non-Indian builders. 458 U.S. at 845, n.10. There, like here, the state gross receipts tax apparently went into general state coffers.

By contrast, in Cotton Petroleum the state did exercise regulatory responsibilities with respect to oil and gas on the Reservation and expended state funds to provide those services, facts which defeated the claimed comprehensiveness of that federal regulatory scheme, and which satisfied the required nexus between the state tax and the services provided for the activity taxed. See ___ U.S. ___, 109 S. Ct. at 1704, n.6; 1711-13.

III. THE LOWER COURT'S JUDGMENT CAN ALSO BE SUSTAINED ON SEVERAL OTHER GROUNDS SINCE THE STATE TAX DISCRIMINATES AGAINST INDIAN TRIBAL INTERESTS AND HAS NOT BEEN AUTHORIZED BY FEDERAL LAW.

The trial judge found "the impact on the federal regulatory scheme is even greater here than in White Mountain because the tax at issue is assessed against . . . the Indian timber." Pet. App. A-20, 590 F. Supp. at 201. There is just no authorization for this state tax on Indian timber yields. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), this Court stated:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.

Also, as recently noted in California v. Cabazon Band of Mission Indians, 480 U.S. ___, n.17, 107 S. Ct. 1083, 1091, n.17 (1987), the Court has adopted a "per se rule"

concerning laws imposed directly on the tribes. Here, the timber yield tax is admittedly a substitute for the state ad valorem property tax on standing timber, selected because the ad valorem tax had produced land use effects which the state legislature found undesirable. In substance, if not in form, the yield tax is a tax upon the property owner, which here is the United States holding bare legal title in trust for the use and benefit of the Hoopa Valley Tribe. The timber constitutes the primary element of value of these lands. See Squire v. Capoeman, 351 U.S. 1, 10 (1956).

To maximize state revenues, the legislature imposed the tax on:

> [T]he first person who acquires either the legal title or beneficial title to timber after it has been felled from land owned by a federal agency or any other . . . entity exempt from property taxation under the Constitution or laws of the United States.

Pet. App. A-45, Cal. Rev. and Tax Code § 38104. In so doing, the legislature plainly discriminated against the Indian holders of these special federal rights. To further the legislature's goal of taxing exempt tribal resources, § 38104 has been read broadly. Where the first owner of felled timber is exempt -- here, the tribal enterprize or an individual Indian logger -- the petitioners have ruled that the tax should be collected from the second person who acquires title to felled timber. A30-31; see A58-60. Thus the state and the Board of Equalization deny to the Hoopa Valley Tribe and the Hoopa Timber Corporation the treatment accorded other owners -- the right to sell to non-Indian mill owners the product of the land owner's forests without

subjecting the mill to timber yield tax liability. Cf. Department of Game v. Puyallup Tribe, Inc., 414 U.S. 44, 48 (1973) (discrimination where "all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is allowed."). A tax of this kind plainly interferes with the Tribe's reserved rights of self-government and management of resources. See Bracker, 448 U.S. at 142-43; Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Crow Tribe of Indians v. Montana, 819 F.2d 895, 902-03 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988).

In addition, the contracting between the Tribe and non-Indian mill owners is subject to the licensing provisions and preemptive effect of the federal Indian Traders Statutes, 25 U.S.C. §§ 261-264 and 25 C.F.R. Part 251. As this Court held in Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 165 (1980), "it is the existence of the Indian trader statutes . . . that pre-empts the field of transactions with Indians occurring on reservations." The non-Indians who harvest reservation timber, or who buy logs on the Reservation from the Hoopa Valley Timber Corporation, are trading with the Indians in a highly regulated area which leaves "no room for these taxes." Bracker, 448 U.S. at 148.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated this 4th day of January, 1990.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

THE HOOPA VALLEY TRIBE, et al., Plaintiffs, v. RICHARD NEVINS, et al., Defendants.	No. C 82 5903 MHP STIPULATION OF FACTS

Plaintiffs, the Hoopa Valley Tribe, a federally recognized Indian tribe and the Hoopa Timber Corporation, a tribal enterprise of the Hoopa Valley Tribe, by and through their attorneys, Ziontz, Pirtle, Morisset, Ernstoff & Chestnut and Robert L. Pirtle and James B. Weber, and defendants Richard Nevins, Conway H. Collis, Ernest J. Dronenburg, Jr., Kenneth Cory, William M. Bennett, members of the California State Board of Equalization, and the California State Board of Equalization, and the State of California, by and through their attorneys, John K. Van de Kamp, Attorney General of the State of California and Julian O. Standen, Deputy Attorney General, stipulate the following facts for purposes of the Motion for Partial Summary Judgment of each party on the issue whether the application of the Forest Taxation Reform Act 1976 to timber sales from trust land inside the Hoopa Valley Reservation, as described herein, is barred by the United States Constitution or federal law. By signing this Stipulation of Facts, the parties do not concede the relevancy of any facts contained herein.

1. Taxes Challenged and Paid.

Plaintiffs Hoopa Valley Tribe and Hoopa Timber Corporation challenge the imposition of timber yield taxes pursuant to California Revenue and Taxation Code, §§ 38115 and 38301, upon all timber harvested from trust land inside the Hoopa Valley Reservation and upon logs manufactured by plaintiff Hoopa Timber Corporation and by other Indian timber purchasers and sold non-Indian purchasers.

The chart following shows all timber sales from trust land inside the Hoopa Valley Reservation upon which defendants have assessed, collected or claimed state timber yield taxes since enactment of the Forest Taxation Reform

Act of 1976 (FTRA). The timber yield taxes imposed apply only to timber cut on or after April 1, 1977.

TIMBER SALE CHART OF THE HOOPA VALLEY RESERVATION

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1976	Soctish C	Paul Masten Logging/ Grant & Colegrove, a partnership	Reservation Ranch,1/ a partnership
1976	Hostler K	Masonite Corp.2/	
1976	Hostler J	Grant & Colegrove, a partnership	Reservation Ranch,1/ a partnership
1976	Hostler I	Glen Moore Logging	Reservation Ranch,1/ a partnership

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1976	Tish Tang D	Grant & Sanderson 2/	
1977	Hostler L	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.
1977	Bull Creek I	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.
1977	Bull Creek H	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.
1977	Bull Creek J	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1977	Soctish D	Hoopa Timber Corporation	Cal-Pacific Manufacturing Co.;1/ West Coast Orient Co.2/
1978	Tish Tang E	Reservation Ranch,1/ a partnership	
1978	Bald Hill G	Grant & Colegrove, a partnership	Reservation Ranch,1/ a partnership

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1978	Pine Creek G	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.; Southwest Forest Industries, 1/ Inc.; Carlotta Lumber Co.;2/ Oscar Peschardt (USA) Inc.2/
1978	Supply Creek H	Reservation Ranch,1/ a partnership	
1979	Supply Creek I	Cal-Pacific1/ Manufacturing Company	

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1979	Hostler Creek M	Sierra Pacific1/ Industries	
1979	Hopkins Creek F	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.
1979	Hostler Creek N	Grant & Colegrove, a partnership	Reservation Ranch,1/ a partnership
1979	Hopkins Creek G	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.
1980	Pine Creek H	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.; Mc Namara & Peepe Corp.1/

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1980	Tish Tang F	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.; Mc Namara & Peepe Corp.1/
1981	Bald Hill H	TAT (USA)1/ Corporation	
1981	Bull Creek K	Hoopa Timber Corporation	Eel River Sawmills, 1/ Inc.
1981	Bull Creek L	TAT (USA)1/ Corporation	

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1982	Bull Creek M	Baldy & Baldy, a partnership	Sierra Pacific Industries; 1/ Eel River Sawmills, 1/ Inc.; Transcontinental, Inc.1/
1982	Hopkins Creek H	Baldy & Baldy, a partnership	Sierra Pacific Industries; 1/ Eel River Sawmills, 1/ Inc.; Transcontinental, Inc.1/
1983	Pine Creek J	Reservation Ranch,1/ a partnership	

1/ Entity against which tax was assessed.
2/ No tax return filed.

Fiscal Year	Logging Unit	Timber Purchaser	Log Purchaser from HTC or Other Indian Timber Purchaser
1983	Hostler Creek O	Glen Moore Logging	Reservation Ranch,3/ a partnership

2. Refund Proceedings.

A. Eel River Sawmills, Inc.

The major purchaser of manufactured logs from plaintiff Hoopa Timber Corporation is Eel River Sawmills, Inc. Specific timber yield taxes assessed and paid by Eel River Sawmills, Inc. for the years 1977 - 1981 are the following:

Contract Year	Tax Amount Assessed and Paid
1977	$106,740.00
1978	92,886.00
1979	57,819.00
1980	97,216.00
1981	53,768.00
	$408,429.00

3/ The first quarterly return upon the sale will be due at the end of 1983.

Eel River Sawmills, Inc. is also purchasing manufactured logs from Baldy & Baldy from the 1982 Bull Creek N and Hopkins Creek H Sales, and is making timber yield tax payments on those ongoing purchases on a quarterly basis. Eel River Sawmills, Inc. has filed no Petition for Redetermination nor Claim for Refund with defendants as to those sales, nor has it filed an action in state court against defendants for recovery of such taxes.

B. Cal-Pacific Manufacturing Company.

Cal-Pacific Manufacturing Company purchased manufactured logs from plaintiff Hoopa Timber Corporation from the 1977 Soctish D Sale and upon that sale paid defendants a total timber yield tax of $73,106.90. The Company then sued defendants in Cal-Pacific Manufacturing Company v. California State Board of Equalization, (San Francisco Superior Court, No. 756287), and obtained a judgment entered July 20, 1983, in the sum of $73,106.90 together with interest in the sum of $44,941.80.

In addition, Cal-Pacific Manufacturing Company purchased timber directly from the United States in the 1979 Supply Creek I Sale and upon that sale paid defendants a total timber yield tax of $21,495.36. Cal-Pacific Manufacturing Company has filed no petition for redetermination nor claim for refund with defendants as to that sale, nor has it filed an action in state court against defendants for recovery of such taxes.

C. Southwest Forest Industries, Inc.

Southwest Forest Industries purchased manufactured logs from plaintiff Hoopa Timber Corporation from the 1978 Pine Creek G Sale and upon that sale paid defendants a total timber yield tax of $18,272.74. Thereafter Southwest Forest Industries sued plaintiff Hoopa Timber Corporation

for that amount and obtained a judgment in the sum of $18,272.74 together with interest after January 1, 1979, and costs, in Southwest Forest Industries, Inc. v. Hupa Timber Corporation, (Humboldt County Superior Court, No. 65145) on October 5, 1981. The Judgment was based upon a contract provision which required plaintiff Hoopa Timber Corporation to reimburse Southwest Forest Industries for any FTRA tax required to be paid by defendants. That judgment is now on appeal before the Court of Appeal for the State of California, First Appellate Division, District I.

D. Reservation Ranch, a Partnership.

Reservation Ranch, a partnership, purchased manufactured logs from Grant & Colegrove, a partnership, from the 1976 Soctish C sale, and upon that sale defendants claimed timber yield tax in the sum of $16,266.83. Reservation Ranch purchased manufactured logs from Glen Moore Logging, a sole proprietorship, from the 1976 Hostler Creek I Sale, and upon that sale defendants claimed timber yield tax in the sum of $21,583.90. Reservation Ranch purchased manufactured logs from Grant & Colegrove from the 1976 Hostler Creek J Sale, and upon that sale defendants claimed timber yield tax in the amount of $47,980.08. Reservation Ranch purchased manufactured logs from Grant & Colegrove from the 1978 Bald Hill G Sale, and upon that sale defendants claimed timber yield tax in the amount of $33,498.79. Reservation Ranch purchased manufactured logs from Grant & Colegrove from the 1979 Hostler Creek N Sale and upon that sale defendants claimed timber yield tax in the sum of $37,114.32. Finally, Reservation Ranch is now purchasing manufactured logs from Glen Moore Logging from the Hostler Creek O Sale of 1983. Timber yield tax payments to defendants relating to that sale will become due with the quarterly payment required at the end of 1983.

Reservation Ranch purchased timber directly from the United States from the 1978 Supply Creek H sale and the 1979 Tish Tang E sale and upon those sales paid defendants timber yield tax in the sum of $79,433.48. Reservation Ranch then filed an action for refund against defendants in H. Westbrook III and R. L. Westbrook, d/b/a Reservation Ranch, v. California State Board of Equalization, (San Francisco Superior Court, No. 758364), for which a trial has not yet been scheduled. Reservation Ranch also purchased timber directly from the United States from the 1983 Pine Creek J Sale, and is making timber yield tax payments to defendants relating to that ongoing sale on a quarterly basis.

Regarding the purchases of manufactured logs from the Soctish C, Hostler Creek I, Hostler Creek J, Bald Hill G, and Hostler Creek N sales, Petitions for Redetermination or Claims for Refunds were filed with defendants by Reservation Ranch, and are currently pending.

E. Masonite Corporation.

Masonite Corporation purchased timber directly from the United States in the 1976 Hostler K Sale. Masonite Corporation has filed no return with defendants upon that sale.

F. Grant & Sanderson.

Grant & Sanderson, a partnership, purchased timber directly from the United States in the 1977 Tish Tang D Sale. Grant & Sanderson filed no return with defendants upon that sale.

G. Sierra Pacific Industries.

Sierra Pacific Industries purchased timber directly from the United States in the 1979 Hostler Creek M Sale, and upon that sale paid defendants timber yield tax in the sum of $35,801.898. Sierra Pacific Industries has filed no Petition for Redetermination nor claim for refund with defendants as to that sale, nor has it filed an action in state court against defendants for recovery of such taxes.

Sierra Pacific Industries is also purchasing manufactured logs from Baldy & Baldy from the 1982 Bull Creek M and Hopkins Creek H Sales, and is making timber yield tax payments on those ongoing purchases on a quarterly basis. Sierra Pacific Industries has filed no Petition for Redetermination nor claim for refund with defendants as to those sales, nor has it filed an action in state court against defendants for recovery of such taxes.

H. McNamara & Peepe Corporation.

McNamara & Peepe Corporation purchased manufactured logs from plaintiff Hoopa Timber Corporation from the 1980 Pine Creek H and Tish Tang F Sales, and upon those sales, paid defendants timber yield taxes. The amount of such taxes paid is not presently ascertainable. McNamara & Peepe Corporation entered into an agreement with plaintiff Hoopa Timber Corporation would withhold $5 per thousand board feet from payments to plaintiff Hoopa Timber Corporation in order to pay and FTRA tax due, thus passing the tax back to plaintiff Hoopa Timber Corporation. The amount withheld under the agreement was approximately $600. McNamara & Peepe Corporation has filed no Petition for Redetermination nor claim for refund with defendants as to those sales, nor has it filed an action in state court against defendants for recovery of such taxes.

I. TAT (USA) Corporation.

TAT (USA) Corporation purchased timber directly from the United States in the 1981 Bald Hill H and 1981 Bull Creek L Sales, and upon those sales paid defendants timber yield tax in the sum of $83,654.99. The TAT (USA) Corporation has filed no Petition for Redetermination nor claim for refund with defendants as to those sales, not has it an action in state court against defendants for recovery of such taxes.

J. Transcontinental, Inc.

Transcontinental, Inc. is purchasing manufactured logs from Baldy & Baldy from the 1982 Bull Creek M and Hopkins Creek H Sales, and is making timber yield tax payments on those ongoing purchases on a quarterly basis. Transcontinental, Inc. has filed no Petition for Redetermination nor claim for refund with defendants as to those sales, nor has it filed an action in state court against defendants for recovery of such taxes.

3. The Hoopa Valley Reservation.

The Hoopa Valley Reservation, set in the ancestral home of plaintiff Hoopa Valley Tribe, was established by the Executive Order of June 23, 1876 by President Grant, 1 Kappler 825, pursuant to the Act of April 8, 1864 (13 Stat. 39). The portion of the Reservation with which this matter is concerned comprises a square of land ("the Square") approximately 12 miles on a side, the large majority of which is prime timber land. At the time of creation of the Reservation, fee title to the entire Reservation was held by the United States. While allotments were made to Hoopa tribal members on the Square in 1922 and 1923, they averaged approximately eight acres apiece and comprised

agricultural land only, not timber land. As a result, the timber land of the Square is held by the United States in trust for the Hoopa Valley Tribe as "tribal trust land." Consequently title to all standing timber on trust land inside the Square is also held by the United States in trust for plaintiff Hoopa Valley Tribe, and the timber is managed by the United States as the prime trust resource of plaintiff Hoopa Valley Tribe.

4. Hoopa Valley Tribe.

Plaintiff Hoopa Valley Tribe is a federally-recognized Indian Tribe whose ancestral home is the Hoopa Valley area of Northern California. Plaintiff Hoopa Valley Tribe is organized pursuant to the Constitution and Bylaws of the Hoopa Valley Tribe in California, which was approved by the Secretary of the Interior August 18, 1972. The governing body of plaintiff Hoopa Valley Tribe is the Hoopa Valley business Council which comprises a Chairman and seven other council members elected at large from the Square to represent each of seven separate political districts into which the Square is divided.

The Hoopa Valley Business Council is charged under the Constitution and Bylaws not only with performing all tribal governmental functions regarding the Square portion of the Reservation but also with managing tribal assets and tribal business ventures. Thus, the Hoopa Valley Business Council exercises all those functions of government exercised by any other federally recognized Indian tribe, including functions ordinarily characterized outside the field of federal Indian law as either governmental or proprietary in nature.

There are approximately 1,650 tribal members. Approximately 60% of the tribal members reside on the Hoopa Valley Reservation. Tribal membership standards, as

set forth in Article IV of the tribal Constitution and Bylaws are as follows:

> (a) All persons of Hoopa Indian blood whose names appear on the official roll of the Hoopa Valley Tribe as of October 1, 1949; provided that corrections may be made in the said roll by the business council within five years from the adoption and approval of this Constitution, subject to the approval of the Secretary of the Interior or his authorized representative.
>
> (b) All children, born to members of the Hoopa Valley Tribe, who are at least one-quarter degree Indian blood, after the effective date of this amendment. Degree or quantum of blood to be determined by adding one-half the degree of Indian blood of each parent as shown on the approved Roll Schedules of the Hoopa Valley Tribe.

5. Method Of Operation Of The Hoopa Valley Business Council.

Within the umbrella of tribal government are a number of committees, established by the Hoopa Valley Business Council, each of which is assigned a specific governmental task Those committees are:

Tribal Credit Committee
Hoopa Valley Telecommunications Corporation
Manpower Program
Timber Corporation Board
Education Committee
Hoopa Valley Public Utilities District Board
Hupa Health Association, Inc.
Hoopa Valley Indian Housing Authority

Election Board
Indian Child Welfare Committee

Among the governmental functions of the Hoopa Valley Business Council are passage of all ordinances and resolutions necessary to govern the Tribe, its members and others within its jurisdiction, and economic enterprises. While each of the committees performs work specifically assigned to it by the Council, no committee has any authority except that specifically assigned by the Council and all committee activities are reported regularly to the Council and reviewed by the Council. The Council employs attorneys for protecting tribal rights and giving legal advice regarding all phases of reservation government and business matters. Frequently the Council meets with officials of the Bureau of Indian Affairs (BIA) in the Northern California Agency or in the Sacramento Area Office and the Council makes regular trips to Washington, D.C. to confer with officials of the Department of the Interior, other agencies of the Administrative Branch and members of the California Congressional delegation.

6. The Hoopa Timber Corporation.

Plaintiff Hoopa Timber Corporation is a wholly tribally-owned subordinate enterprise of plaintiff Hoopa Valley Tribe. Plaintiff Hoopa Timber Corporation is neither a stock corporation nor a membership corporation. As reflected in the Charter of plaintiff Hoopa Timber Corporation, the Corporation is organized pursuant to Article IX, Section 1(p) of the tribal Constitution which does not authorize the creation of corporations but which does authorize the creation of subordinate bodies for the operation of economic enterprises to benefit plaintiff Hoopa Valley Tribe. The Charter further provides that the seven-member Board of Directors of the Corporation is selected by the Hoopa Valley Business Council. Finally, the Charter

provides that the Corporation can be amended only by a three-fourths majority vote of the tribal Business Council and that the tribal Business Council can dissolve the Corporation and assume all corporate debts, obligations and assets upon a three-fourths majority vote of the tribal Business Council. As a matter of strict legal analysis, plaintiff Hoopa Timber Corporation is not a tribal corporation and not a state corporation organized under state law but a wholly tribally-owned subordinate organization of plaintiff Hoopa Valley Tribe, subject to total tribal control.

7. Dependence of Plaintiff Hoopa Valley Tribe Upon Timber Revenue.

The Square portion of the Hoopa Valley Reservation is situate some 60 miles inland from Eureka, California in the Pacific Cascade Mountain Range. The terrain is heavily forested and rugged and the Reservation is remote from any sizable population center. Employment and industrial opportunities in the vicinity of the Reservation are extremely limited and largely concentrated in one or another phase of the timber industry. Because of the remoteness of the Reservation from any large population centers and the fact that the Reservation is not served by air, rail or water transportation systems, development of manufacturing enterprises has not been possible either for plaintiff Hoopa Valley Tribe or for industry generally. Finally, destruction of the fish resource in the Klamath-Trinity River system has forced plaintiff Hoopa Valley Tribe to rely almost entirely upon timber-related revenue for supporting the tribal budget and employing tribal members. The extent of economic dependence of plaintiff Hoopa Valley Tribe upon the timber industry is shown in the following chart:

ANNUAL INCOME OF HOOPA VALLEY TRIBE

Income Item	Fiscal Year 1977	Fiscal Year 1978	Fiscal Year 1979
Collected by United States:			
Timber & Stumpage: 1/	$1,239,393.44	$1,161,246.45	$1,091,754.82
Leases, rentals, permits, fees:	1,259.11	1,293.96	648.83
Interest on deposits in U.S. Treasury:	34,744.55	20,756.83	61,400.54
Collected by Tribe:			
Rentals:	48,091.14	42,505.80	38,602.25
Interest:	6,456.65	4,848.76	6,736.03
Miscellaneous:	20,076.80	36,982.81	16,718.00
Tribal Enterprises:	102,025.85	138,276.59	16,868.81
[HTC Component]:	[86,755.64]	[232,279.28]	[27,989.16]
Federal Grants and Contracts:			
Revenue Sharing:	34,596.11	29,655.16	31,440.38
Anti-Recessionary Income:	19,930.53	16,609.00	.00
Special Grants (Restricted) & Contracts 2/	340,852.36	309,989.85	941,210.38
State Grants:			
Dept. of Education:	35,100.93	53,800.79	48,100.38
TOTAL	$1,882,527.97	$1,815,966.00	$2,253,480.42

1/ The timber and stumpage revenue figure includes only the 30% allocated to plaintiff Hoopa Valley Tribe by the United States as a result of Short v. United States, 202 Ct. Cl. 870 (1973).

2/ The Special Grants (Restricted) and Contracts include the following grants: HUD Community Development Grant, EDA Grant for logyard construction, BIA Higher Education Grant, Johnson-O'Malley Grant, CETA Act Grant and Public Law 93-638 contracts. All federal funding for these special grants and contracts is required to be used by plaintiff Tribe pursuant to strict federal statutory provisions and regulations and not for any tribal discretionary programs. The Tribe is barred from profiting from such grant and contract programs. Federal audits monitor expenditures of such funds and failure of plaintiff Tribe to abide by the restrictions can result in fund recoupment by the U.S. by offset procedures or federal court action.

ANNUAL INCOME OF HOOPA VALLEY TRIBE (Continued)

Income Item	Fiscal Year 1980	Fiscal Year 1981	Fiscal Year 1982
Collected by United States:			
Timber & Stumpage: 1/	$1,244,783.00	$1,626,085.00	$2,089,407.00
Leases, rentals, permits, fees:	(17,050.00	(12,452.00	18,488.00
Interest on deposits in U.S. Treasury:	(	(	
Collected by Tribe:			
Rentals:	38,114.00	62,698.00	38,023.00
Interest:	29,161.00	145,960.00	111,786.00
Miscellaneous:	201,262.00	61,496.00	78,719.00
Tribal Enterprises:	975,829.00	821,087.00	(-447,186.00)
[HTC Component]:	[602,214.00]	[246,075.00]	[(-493,651.00)]
Federal Grants and Contracts:			
Revenue Sharing:	24,780.00	.00	.00
Anti-Recessionary Income:	.00	.00	.00
Special Grants (Restricted) & Contracts 2/	2,661,906.00	1,835,542.00	1,794,940.00
State Grants:			
Dept. of Education:	56,944.00	67,979.00	70,165.00
TOTAL	$5,249,829.00	$4,879,374.00	$3,754,342.00

1/ The timber and stumpage revenue figure includes only the 30% allocated to plaintiff Hoopa Valley Tribe by the United States as a result of the Short v. United States, 202 Ct. Cl. 870 (1973).

2/ The Special Grants (Restricted) and Contracts include the following grants: HUD Community Development Grant, EDA Grant for logyard construction, BIA Higher Education Grant, Johnson-O'Malley Grant, CETA Act Grant and Public Law 93-638 contracts. All federal funding for these special grants and contracts is required to be used by plaintiff Tribe pursuant to strict federal statutory provisions and regulations and not for any tribal discretionary programs. The Tribe is barred from profiting from such grant and contract programs. Federal audits monitor expenditures of such funds and failure of plaintiff Tribe to abide by the restrictions can result in fund recoupment by the U.S. by offset procedures or federal court action.

The following chart shows the percentage of Hoopa tribal timber revenue as a percentage of total tribal income for the years 197-82:

HOOPA TRIBAL TIMBER REVENUE1/ AS PERCENTAGE OF TRIBAL INCOME

	FY 1977	FY 1978	FY 1979	FY 1980
Tribal Income, Not Including Special Federal Grants & Contracts & Grants	90%	97%	93%	74%
Tribal Income, Including Special Federal Grants & Contracts & State Grants	72%	78%	52%	36%

	FY 1981	FY 1982	6 Year Average
Tribal Income, Not Including Special Federal Grants & Contracts & State Grants	63%	85%	84%
Tribal Income, Including Special Federal Grants & Contracts & State Grants	39%	43%	53%

1/ Hoopa tribal timber revenue includes timber and stumpage, interest on deposits in the United States Treasury and Hoopa Timber Corporation net income only, and does not include leases, rentals, permits and fees for the years 1977-1979. But for the years 1980-82, Hoopa Tribal timber revenue includes leases, rentals, permits, and fees because of a change in accounting procedures inside the tribal office. As can be seen from the years 1977-79, however, in the Annual Income Chart, that item is very small in relation to interest on timber revenue deposits and thus its effect upon the percentage figures is de minimis.

8. The Need for and Establishment of the Hoopa Timber Corporation.

Funding for all tribal governmental functions derives from timber revenues of plaintiff Hoopa Valley Tribe and a small amount of income from other sources, as shown in the Annual Income Chart on contained in Paragraph 7, above.

Because of the trust status of Reservation lands and because of the trust responsibility of the United States toward plaintiff Hoopa Valley Tribe and tribal members, the State of California has no responsibility for timber or timber land inside the Reservation, except for limited reciprocal fire protection services which, as described elsewhere herein, are provided only for fires that threaten off-Reservation lands.

Until recently, all timber development was done by non-Indians and the participation of plaintiff Hoopa Valley Tribe was limited to work by tribal members as loggers and other laborers, leaving the establishment of lumber mills and ownership and maintenance of logging equipment to the non-Indian industrial community. The result was that plaintiff Hoopa Valley Tribe obtained only stumpage value for tribal timber while the non-Indian industrial community. The result was that plaintiff Hoopa Valley Tribe obtained only stumpage value for tribal timber while the non-Indian industrial community obtained whatever profit derived from milling operations.

During the decade of the 1960s a number of mills in the vicinity of the Hoopa Valley Reservation vied for Reservation timber. But with increasingly hard economic times one mill after another closed and for a time only two lumber mills on the Reservation purchased tribal timber. During this period plaintiff Hoopa Valley Tribe was beset with chronic unemployment and frustrated because of its

inability either to maximize the return from the tribal timber resource or to train tribal members within the logging industry. The Hoopa Valley Business Council felt that minimum bids established by the Bureau of Indian Affairs were too low and that if plaintiff Hoopa Valley Tribe were ever to break out of the economic trap in which it found itself it must establish its own timber enterprise. Accordingly, the Council established the Hoopa Timber Corporation by Resolution No. 76-163 on November 11, 1976.

9. Bureau of Indian Affairs Forestry Program on the Hoopa Valley Reservation.

In the case of plaintiff Hoopa Valley Tribe, the Northern California Agency of the BIA maintains a Forestry Department with an authorized maximum of staff of 20 full-time positions. An average of 16 of those positions have been filed with foresters and supporting administrative staff during the period 1977-83. The BIA has established a sustained yield program for the Hoopa Valley Reservation and each year determines one or more timber sale areas within an overall area of approximately 600 contiguous acres. The BIA conducts cruises of the different timber blocks in each sale area, establishes minimum stumpage prices per thousand board feet, and regulates all phases of timber sales harvesting and management pursuant to the regulations of 25 CFR Part 163, including fire suppression, fire fighting, reforestation, slash clearance, road construction and maintenance and the like.

During the harvesting of each sale a BIA contract officer is required to be present at the logging site, and the BIA regulates scaling requirements for all logs harvested from the Reservation in every sale. All sales of timber from tribal trust land are made on BIA Forms 5-5324 and 5-5323 (Rev. May 1976). An example of such a timber sale

contract is attached hereto as Exhibit G. The BIA timber contract officer requires each logging company to follow the BIA established logging plan and insures that roads are properly constructed, streams protected, and that slash clearance proceeds according to BIA regulations.

The following chart shows the budget for forestry services regarding the Hoopa Valley Reservation of both the Northern California Agency and the Sacramento Area Office of the Bureau of Indian Affairs:

BUREAU OF INDIAN AFFAIRS FORESTRY BUDGET FOR THE HOOPA VALLEY RESERVATION

Year	Forestry Budget Northern California Agency	Agency Fire Fighting Budget	Agency Fire Suppression Costs (in addition to Fire Fighting Budget	Administrative Fees Derived from Reservation Timber Sales	Sacramento Area Office Timber Budget Attributable to Hoopa Valley Reservation (Approx.70%)
1977	$361,700	$ 80,000	Unknown	Unknown	$ 35,000 ±
1978	$439,300	$ 85,553	Unknown	Unknown	$ 35,000 ±
1979	$431,846	$155,108	Unknown	Unknown	$ 35,000 ±
1980	$462,724	$ 97,407	$500,000 ±	$250,000±	$ 60,000 ±
1981	$655,422	$236,377	$1,250,000±	$250,000±	$ 60,000 ±
1982	$567,839	$195,747	$500,000 ±	$250,000±	$ 60,000 ±
1983	$524,700	$194,823	$100,000 ±	Unknown	$ 60,000 ±

As can be seen from the chart, federal expenditures between 1980 and 1982 on timber matters regarding the Hoopa Valley Reservation total of $5,395,516.00, an average of $1,798,505.00 per year. In addition, tribal expenditures in regard to forestry matters, apart from expenditures of plaintiff Hoopa Timber Corporation, are the following:

HOOPA VALLEY TRIBE FORESTRY BUDGET

	Salaries of Tribal Forestry Staff	Administrative Costs	Total
1977	$264,492.22	$249,809.23	$514,301.45
1978	256,444.00	334,806.00	591,250.00
1979	227,425.00	278,043.00	505,468.00
1980	272,889.00	313,468.00	586,357.00
1981	137,013.00	212,106.00	349,119.00
1982	11,744.00	75,151.00	86,895.00
TOTAL	$1,170,007.22	$1,463,383.23	$2,633,390.45

10. The Beginning of the California Timber Yield Tax: The Forest Taxation Reform Act of 1976 (FTRA).

The 1976 California timber yield tax is part of a broader taxation and environmental protection package known as the Z'berg-Warren-Keene-Collier Forest Taxation Reform Act of 1976.

In general, the Forest Taxation Reform Act of 1976 (FTRA) provides for (1) the creation of forest preserve zones for privately owned timber land, (2) directs that such zones be assessed for property tax purposes solely on the basis of their value for timber growing and harvesting purposes, (3) exempts standing timber from local property taxes altogether, and (4) creates instead a yield tax on the value of the timber at the time of the harvest.

Under the FTRA a local assessor is required to (1) grade all timber preserve parcels according to standards of site quality and operability, (2) assign each parcel the value appropriate to its grade according to a schedule determined by the State Board of Equalization, and (3) assess the land

on the site class value plus the value of any existing compatible uses. Annual real property taxes are assessed, not including the value of standing timber which is now exempt under the new tax act from annual property taxation but subject instead to a single yield tax when the timber is severed from the land and harvested.

In effect, the California timber yield tax is a state property tax collected on the state level that parallels and replaces annual county ad valorem taxes on standing timber.

11. The California Ad Valorem Property Tax.

Under California law, all property in California, unless otherwise provided, is subject to the ad valorem property tax. (Cal. Const. Art. XIII, § 1.) Taxable property includes both real property and possessory interest in real property. (Cal. Rev. & Tax Code §§ 104 and 107; Cal. Gov't. Code §§ 29100 et seq., §§ 43000 et seq.) With certain exceptions not relevant to this case, all taxable property is enrolled on either the secured or the unsecured roll of the county in which it is located and is taxed by that county.

Since real property is defined as including standing timber (Cal. Rev. & Tax Code § 104), prior to the effective date of FTRA the counties applied the ad valorem property tax to standing timber within their respective jurisdictions. But because Indian land held in trust by the United States is exempt from state taxation, the ad valorem property tax was applied neither to the tribal land of the Square nor to the standing timber on that land.

However, in the years 1972-74, Humboldt County and other counties applied the ad valorem property tax to possessory interests in federal timber, i.e., contractual harvest rights of private parties in standing timber on federal land.

The effective tax rate was 2% of the full value of the contractual right existing on the March 1 lien date each year. The unsecured roll of Humboldt County indicates that the following taxes were collected on possessory interests in standing timber on the Square for the years indicated:

Year	Possessory Interest Tax
1972	$13,303.56
1973	2,402.36
1974	11,415.07

In each case the ad valorem property tax was paid by the private owner of the possessory interest in tribal timber. Due to difficulties in retrieving the necessary information, the Humboldt County Assessor is unable to determine whether other ad valorem property tax was collected upon possessory interests in tribal timber in the years 1972-1974 or in other years.

The amount of ad valorem property tax revenue previously collected on possessory interests in tribal timber per year is less than the amount of FTRA tax collected on tribal timber per year although the amount of the difference cannot now be determined. Two factors prevented Humboldt from taxing each possessory interest in tribal timber. The first was that at least some timber purchasers were able to avoid the tax by limiting the terms of their contracts to less than a year, so that the contracts would not be in existence on the March 1, lien date. The second reason was that the tax was imposed only on the value of the possessory interest as of the lien date and not on the value of the possessory interest on the date of its creation. Thus, if the contract had been partially performed as of the lien date, the tax was imposed only on the remaining value of the contract.

12. Inherent Problems with the California Ad Valorem Tax Scheme.

Prior to the FTRA, the reproductive capacity of California timberlands was greatly under-utilized largely because of tax disincentives built into the State's system of ad valorem taxation of standing timber. Unmodified, ad valorem taxation discourages maximum timber production by assessing timberlands at their "highest and best use" (generally something other than the tree production) and by creating a "time bias" which discourages timber growing by assessing immature timber annually over a long growth period before timber owners can realize any income from their investment. Thus in general, but not necessarily in all cases, timber owners are discouraged from owning land for the production of timber. Those landowners who did produce timber were encouraged by the annual tax on standing timber to harvest the timber at the earliest possible time.

Two major modifications to the California ad valorem system of taxing occurred prior to the enactment of the FTRA. In 1926, Article XIII, Section 12-3/4 of the State Constitution was approved, which exempted from taxation standing timber that remained after a harvest of 70% or more of an owner's standing timber. The exemption was good for 40 years or until the remaining timber reached maturity, whichever was longer. Although providing some relief from the problem of "time bias," reclassification of timber as "mature" (usually after more than 40 years) generally invoked property taxation and encouraged owners to harvest timber before it reached its maximum growth potential.

In 1965, California passed the Williamson Act [Cal. Gov't Code §§ 51200 et seq.] which allowed timber owners to limit their tax liability by entering into an "open space

contract" pursuant to § 51240 of the Government Code. Once the contract was in effect, timber and timberland were valued at the present worth of the amount which the timber could reasonably be expected to yield at harvest combined with the present value of the income attributable to other compatible uses. Cal. Rev. and Tax Code § 423.5. Although this value was generally lower than the "highest and best use" value, "open space contracts" were available at the option of the county, and even when they were in effect they caused great dissatisfaction among timber owners.

Based on numerous reports from as early as 1972 when the pre-FTRA problem was first brought to the attention of the Assembly Committee on Natural Resources and Conservation, the California Legislature almost unanimously favored a yield tax to replace the ad valorem tax. Responding to the growing shortage of wood fiber facing California, the California legislature enacted the FTRA to eliminate the disincentives to timber production caused by the State's method of ad valorem taxation. See D. Cromwell, K. Fowler & B. Krumland, Tax Policy for California Timberland, (1974); California Senate Select Committee on Taxation of Timber and Timberland, Preliminary Report, (1975); D. Teeguarden, A Yield Tax System for California Timber, (1974). See generally W. Unkel & D. Cromwell, California's Timber Yield Tax, Ecology Law Quarterly (1978).

13. Application of the FTRA to Timber from the Hoopa Valley Reservation.

No California timber yield tax is levied whenever the first person to acquire ownership of felled timber from federally-owned land is an entity, such as plaintiff Hoopa Valley Tribe or plaintiff Hoopa Timber Corporation, which is itself exempt from California taxation. Defendant State Board of Equalization ruled by Letter Ruling dated

November 28, 1978 and sent to all state timber owners, that in such an instance the timber yield tax is due from the first non-exempt person who acquires legal title or beneficial title to the timber. This letter ruling was embodied in Property Tax Rule 1026, California Administrative Code, on August 19, 1980, attached hereto as Exhibit A.

14. Taxability of Indians Residing Off the Reservation.

Indians, including members of plaintiff Hoopa Valley Tribe, reside off the Hoopa Valley Reservation in nearby communities within Humboldt County and within the Trinity-Klamath Joint Unified School District. Taxable property owned by those Indians is subject to ad valorem property taxes the same as is similar property owned by non-Indians in those communities.

15. State, Federal, and Tribe Interests and Services on the Hoopa Valley Reservation.

A. Patterns of Land Ownership.

The total land acreage inside the Hoopa Valley Square is 88,666 acres. This figure comprises 85,430 acres of tribal trust land, 1,233 acres of individually-allotted trust land, 1,938 acres of fee land and 65 acres of land devoted to church, school and BIA agency uses.

The 1,938 acres of fee land comprises parcels remaining from allotments of approximately 8 acres each made to members of plaintiff Hoopa Valley Tribe in the 1920s. Some of the parcels are owned by the plaintiff Hoopa Valley Tribe and tribal entities, some are owned by individual Indians, and some are owned by non-Indians. Most such fee land abuts the Trinity River and was chosen for allotments because it is flat land, suitable for agricultural

purposes. Only 600 acres of fee land inside the Square contains commercial timber. All remaining commercial timber inside the boundaries of the Square stands on either tribally owned or individually allotted trust land.

B. Population Analysis.

The Square portion of the Hoopa Valley Reservation is situate in Humboldt County, California. The Extension portion of the Reservation is situate in Humboldt and Del Norte Counties, California. Ex. B to this Stipulation is an excerpt from the 1980 Federal Census estimating population on the Reservation. Ex. C to this Stipulation is an excerpt from the 1980 Federal Census indicating population for Census Tract 0101, which includes the Square and the part of the Extension portion of the Reservation in Humboldt County and the surrounding off-Reservation area, including the off-Reservation communities of Willow Creek and Orleans. A map of Census Tract 0101 is attached to the excerpt. Ex. D to this Stipulation is an except from "Information Profiles of Indian Reservations in Arizona, Nevada and Utah," published in 1981 by the Phoenix Area Office of the Bureau of Indian Affairs, which contains an estimate of the Indian population of the Hoopa Valley Square and Extension. Ex. E to this Stipulation is an excerpt from "Indian Service Population and Labor Force Estimates," published in 1983 by the Bureau of Indian Affairs, which contains an estimate of the Indian population of the Square and Extension portions of the Reservation and which includes an introduction explaining why the estimates vary from the estimates contained in the 1980 Federal Census.

Based on the Federal Census information contained in Exs. B and C, the population of the Hoopa Valley Reservation as a whole is 61% Indian and 39% non-Indian.

C. Roads on the Hoopa Valley Reservation.

The road system of the Hoopa Valley Reservation comprises roads of four distinct categories: State Highway No. 96, Humboldt County roads, the BIA Road System and tribal roads.

State Highway No. 96, approximately 154 miles in total length, 12 miles of which are on the Reservation, is maintained by the State and provides the principal road access to the Reservation as well as the only direct access road between the Northern California coast and inland towns served by State Highway 96 between the coast and State Highway 96's intersection with I-5. State Highway No. 96 enters the southern end of the Reservation several miles north of Willow Creek, California and roughly follows the bed of the Trinity River northward through the Reservation, meandering 12 miles on the Reservation and exiting the Reservation at its northern boundary at Weitchpec.

For its length through the Reservation, State Highway No. 96 overlies tribally-owned trust land, individual allotments, and fee land of former allotments. Portions overlying tribal or individual trust land were constructed pursuant to rights-of-way obtained from the Secretary of the Interior pursuant to federal statutes. That portion of State Highway No. 96 lying inside the Reservation was constructed by Humboldt County but later transferred to the State of California.

The Humboldt County road system, maintained by the County, comprises 16 miles of roads inside the Reservation of which nine miles are paved and seven miles are gravel-surfaced. The system includes roads constructed both by the BIA with federal funds and by the County with state funds. The BIA portions were later transferred to

Humboldt County and all portions of the county roads are maintained with county funds. In 1983, the cost of maintaining the county road system on the Reservation was $49,950, an amount comparable to that of annual maintenance costs for recent years.

The BIA Road system comprises 247 miles of roads. Of the BIA Road System, 10.5 miles are paved, 27.5 miles are graveled and the remaining 209 miles are dirt. All of the BIA Road System was constructed and is maintained with federal funds. In 1983, the cost of maintaining the BIA Road System on the Reservation was $195,000, an amount comparable to that of annual maintenance costs for recent years.

The tribal road system comprises 180 miles of dirt roads, most of which were constructed pursuant to timber sale contracts. Maintenance is paid for by plaintiff Hoopa Valley Tribe predominately on the basis of access needs regarding current timber sales.

D. Hoopa-Willow Creek Bus System.

Beginning October, 1982, a bus system operated by the Hoopa Valley Public Utility District, a subordinate Tribal enterprise, began service between Hoopa, the principal community within the Reservation and Willow Creek, some 12 miles to the south. Funding for the bus system derived from a bus valued at $22,500 obtained by plaintiff Hoopa Valley Tribe from the United States, and an agreement between plaintiff Tribe and Humboldt County for the years 1983 and 1984 through which the County assumed responsibility for operating costs and the Tribe assumed responsibility for administrative costs which are estimated to be approximately 15% of operating costs. For the nine months in 1983 in which the system was in operation, the County contributed as operating costs $44,000 derived from

California State Transit Funds. For 1984 the County has allocated $36,000 in California State Transit Funds for operating costs. For 1985 and thereafter plaintiff Tribe intends to assume all operating and administrative costs of the system which serves both Indians and non-Indians on and off the Hoopa Valley Reservation.

E. Fire Protection Services.

The only fire protection services generally available for structural (as opposed to timber) fires on the Square are provided by the Hoopa Volunteer Fire Department, a tribal enterprise that was organized in fiscal year 1982. During FY 1982, the Volunteer Fire Department was funded with a $20,000 BIA contract under P.L. 93-638, and received a BIA fire truck worth $78,000. During FY 1983, the Hoopa Volunteer Fire Department received federal funding totaling $350,000. $20,000 of that was provided by the BIA under a P.L. 93-638 contract. The remaining $330,000 was a federal Community Development Block Grant for construction of a fire house and purchase of another fire truck. Operating expenses during 1984 will be funded with the $20,000 BIA contract and $10,000 in tribal funds. Through FY 1983, no state or county funds were provided for the Hoopa Volunteer Fire Department. During FY 1984, the California Department of Forestry will loan to the Hoopa Volunteer Fire Department a used fire truck which is designed for fighting brush fires but is not designed for combating structural fires. It will be used as a backup vehicle by the Volunteer Fire Department. The value of this truck is $18,000.00. The loan to the Volunteer Fire Department will maintain the truck and keep it available for use at any time by the California Department of Forestry.

The communities of Willow Creek and Orleans, off the Reservation maintain their own volunteer fire departments. The Hoopa Volunteer Fire Department and

volunteer fire departments in surrounding off-Reservation communities provide mutual aid fire assistance to each other on a reciprocal basis.

F. The Hoopa Valley School System.

The Square lies entirely within the boundaries of the Klamath-Trinity Joint Unified School District which serves portions of both Humboldt and Trinity Counties. The portion of Trinity County served by the District includes the Town of Salyer. The portion of Humboldt County served by the District, includes the off-Reservation communities of Willow Creek, Orleans, Burnt Ranch and Hawkins Bar.

The District operates Hoopa High School and five elementary schools, Hoopa Elementary School, Orleans Elementary School, Weitchpec Elementary School, Jack Norton Elementary School, and Trinity Valley Elementary School. Hoopa High School and Hoopa Elementary School are situate on the 52 acres of former tribal trust land worth approximately $182,000, donated by plaintiff Tribe to the District in fee simple.

According to a 1979-80 report of the Cal. Dept. of Educ., 53% of the students in the District are Indians and 47% of the students are non-Indian. The 1983 enrollment in the six schools operated by the District was approximately 1,076 students, whose distribution among the different schools is approximately the following:

Hoopa High School	276
Hoopa Elementary School	404
Orleans Elementary School	150
Weitchpec Elementary School	26
Jack Norton Elementary School	20
Trinity Valley Elementary School	200

While the District cannot supply figures for the number of Indian students in each of the six schools operated by the District, it does keep figures for Public Law 81-874 Federal Impact Assistance purposes. Those figures are as follows:

PUBLIC LAW 81-874 FEDERAL
IMPACT ASSISTANCE STUDENT CHART

1. Students (1) who live on Indian trust land or (2) who live on federal non-Indian land and have a parent who works on federal land.

a. Special education students living on Indian trust land: 26
b. Students living on Indian trust land in low-rent housing: 44
c. All other students living on Indian trust land: 291
d. Students living on Forest Service land whose parents work on federal land: 10

2. Students (1) whose parent works, but who do not live, on Indian trust land, or (2) who live or whose parent works (but not both) on federal non-Indian land:

a. Students whose parents work on Indian trust land: 63
b. Students whose parents work in the Trinity National Forest: 3
c. Students whose parents work in the Six Rivers National Forest: 73
d. Students whose parents work in the Klamath National Forest: 2

Total 512

Thus it can be seen that students for whom the District receives Public Law 81-874 Federal Impact Assistance total 512 or 48% of the total student population of the District.

Plaintiff Hoopa Valley Tribe levies no taxes against the School District for tribal governmental services, such as fire protection, provided by plaintiff Tribe to the schools operated by the School District on the Square, nor are fees charged to the School District for use of tribal facilities, such as the tribal gymnasium which was constructed solely with federal and tribal funds. During the 1983-84 school year, the two schools on the Square will be connected to the water system operated by the Hoopa Valley Public Utility District, a tribal entity. Although the School District will pay a water user fee, such user fees are insufficient to pay the operating costs of the Hoopa Valley Public Utility District. Those operating costs are subsidized by the United States and the Tribe. The School District, like the State and County, made no contribution toward the $2.6 million construction cost of the water system.

The following Funding Source Chart shows the funding sources for the District for the years 1981 through 1984.

FUNDING SOURCE CHART
KLAMATH-TRINITY JOINT UNIFIED SCHOOL DISTRICT

Source	1981-82	1982-83	1983-84(Est.)
1. Federal Funds:			
A. P.L. 81-874 1/ Federal Impact Assistance	$ 264,742.	$ 456,557.	$ 343,000.
B. Federal 2/ Forest Reserve Funds	484,294.	177,886.	250,378.
C. Other 3/ Federal Funds	1,783,568.	919,887.	1,700,411.
2. State Funds:			
A. General 4/ Funds	1,771,694.	1,577,556.	2,087,842.
B. FTRA	500,590.	510,412.	247,097.
3. Local Funds: 5/			
A. General Funds	349,888.	361,748.	344,384.
TOTAL	~~$4,804,733~~ $5,154,776.	$4,004,046.	$4,973,112.

1/ Public Law 81-874 Federal Impact Assistance. These funds are distributed to local school districts upon the basis of attendance for purposes of compensating local school districts for tax revenues which are precluded by virtue of the existence of Indian trust land and federal non-Indian land.

2/ Forest Reserve Funds. These funds derive from a federal program which allocates to local school districts 12.5% of all revenues from sales of timber on federal non-Indian lands.

3/ Other Federal Funds. These funds derive principally from federal programs unrelated to tax revenues and include such items Title IV, Part A, of the Indian Education Act.

4/ State Funds. These funds are received from the State of California General Fund and are unrelated to revenues generated under FTRA. Listed separately are timber yield tax funds (FTRA).

5/ Local Funds. These funds are derived from School District taxes on the local secured and unsecured rolls.

In addition to all funds shown in the Funding Source Chart above, the District benefits from Johnson-O'Malley funds and, in 1983-84, Indian Education Act Title IV Part B funds funneled by the United States through plaintiff Hoopa Valley Tribe. The following charts show Johnson-O'Malley funds and Indian Education Act Title IV Part B funds for the years indicated:

FEDERAL JOHNSON-O'MALLEY FUNDS
BENEFITING KLAMATH-TRINITY JOINT
UNIFIED SCHOOL DISTRICT

Year	Federal Funds Received
1977-78	$111,826.00
1978-79	116,880.00
1979-80	104,331.00
1980-81	97,112.00
1981-82	88,730.00
1982-83	77,138.00
1983-84 (estimate)	69,120.00

FEDERAL INDIAN EDUCATION ACT
TITLE IV PART B FUNDS BENEFITING
KLAMATH-TRINITY UNIFIED SCHOOL DISTRICT

1983-84 (estimate)	$106,568.00

Johnson-O'Malley Funds were used by plaintiff Tribe to buy and equip a reading lab at the Hoopa Elementary School and are now used to fund operation of the reading lab and to pay tutors at both Hoopa Elementary School and Hoopa High School. Indian Education Act Title IV Part B funds are federal discretionary grant funds granted to the Tribe for the first time in 1983-84 to establish and operate a program for gifted and talented students.

Finally, because of decreases in Johnson-O'Malley funds in recent years, the Tribe has made grants to the School District, to supplement its Johnson-O'Malley program, in the following amounts.

HOOPA VALLEY TRIBAL GRANTS TO SUPPLEMENT JOHNSON-O'MALLEY PROGRAM AT KLAMATH-TRINITY JOINT UNIFIED SCHOOL DISTRICT

Year	Tribal Funds Received
1980-81	$ 2,000.00
1981-82	0
1982-83	$ 7,242.00
1983-84	$ 20,689.00

The following chart compares funding sources for the District:

FUNDING SOURCE COMPARISON CHART KLAMATH-TRINITY JOINT UNIFIED SCHOOL DISTRICT

	Total Budget 1/	Federal and Tribal Funds 1/	Federal & Tribal Funds as Percentage of Total Budget
1981-82	$5,243,506 ~~$4,893,463~~	$2,621,334.	50% ~~54%~~
1982-83	$4,088,426.	$1,638,710.	40%
1983-84 (Est.)	$5,169,489.	$2,490,166.	48%

1/ These figures include the Johnson-O'Malley funds, Indian Education Act Title IV Part B funds, and tribal funds shown in the charts above.

In addition to the School District, the Hoopa Valley Tribe provides two educational programs. The Tribe's pre-school services are funded primarily by $184,000 per year in federal Head Start grants. The Tribe contributed $10,034 of tribal funds for these programs in FY 1983 and will provide $25,789 for these programs in FY 1984. The programs were also supported by a $69,237 dollar cost reimbursement contract from the California Department of Child Development Services in FY 1983 and by a foundation grant from the Presbyterian Church of $14,000 in FY 1983. The Tribe's pre-school program is open to all children, both Indian and non-Indian, residing on the Square portion of the Reservation. The Tribe also operates an adult education program under a $110,000 per year BIA contract. The adult education program is open to all Indians who are enrolled in the 11 tribes served by the Northern California Agency of the BIA, and is also open to non-Indian residents of the Square portion of the Reservation. No state or county funding is provided for the adult education program.

G. Law Enforcement.

Humboldt County maintains, in Hoopa, a sheriff's substation and a County Justice Court. The cost of maintaining the Sheriff's substation in 1984 was $600,000, a cost comparable to that of previous years. The cost of maintaining the County Justice Court at Hoopa was $60,000 in 1984, a cost comparable to that of previous years.

The building housing the sheriff's substation and Justice Court is tribally owned and is located on eight acres of tribal trust land. The building and land have been leased by plaintiff Tribe to the County under a 99 year rent free lease. The value of the building and land is approximately $150,000.

The Justice Court and the sheriff's substation serve both Indians and non-Indians within their respective jurisdictions which comprise the entire northeastern portion of Humboldt County. The Reservation makes up less than 20% of the service area.

State law enforcement jurisdiction over Indians on the Hoopa Valley Reservation was granted by P.L. 83-280, 25 U.S.C. §§ 1321-1326 and 28 U.S.C. § 1360. Congress, with the Tribe's concurrence, granted the California Legislature's petition to Congress to pass the Act that became P.L. 83-280. Although other states made their requests for jurisdiction over reservation Indians contingent on federal funding to off-set the costs of such jurisdiction, the petition by the California Legislature was not contingent on such federal funding.

The BIA has established a twelve position law enforcement staff on the Reservation which serves both Indians and non-Indians. At present, nine positions are filled and the BIA is in the process of hiring three additional police officers. The BIA law enforcement budget figures for the years 1977-82 are shown on the chart below:

BUDGET FOR BIA LAW ENFORCEMENT SERVICE ON HOOPA VALLEY RESERVATION

Years	Amount
1977	$250,000
1978	$300,000
1979	$312,000
1980	$395,000
1981	$395,000
1982	$395,000

H. Welfare Services.

Both enrolled members of plaintiff Hoopa Valley Tribe and other Indians are eligible for all welfare services provided by or through Humboldt County by virtue of the Fourteenth Amendment of the United States Constitution and the Act of June 2, 1924, 43 Stat. 253, 8 U.S.C. § 1401(a)(2), which made all American Indians citizens of the United States and the respective states of their residence.

The Humboldt County Welfare Department does not maintain data concerning welfare assistance provided to enrolled tribal members or other Indians, but does maintain welfare data by ZIP code area. The United States Post Office ZIP code area 95546 consists of the Square and a portion of the Extension to the end of State Highway No. 169. The following chart describes the amount paid under various welfare programs to both Indian and non-Indian residents of ZIP code area 95546 in 1983. The amounts are comparable to amounts paid in recent years:

1983 WELFARE BENEFIT PAYMENTS - ZIP 95546

Types of Benefits	1983 Payments	Funding Sources
1. Aid to Families With Dependent Children (AFDC)	$1,074,660	50% U.S. 40% State 10% County
2. Food Stamp Benefits to AFDC Recipients	192,000 1/	100% U.S.
Food Stamp Benefits to Non-AFDC Recipients	111,600 1/	100% U.S.
3. Medi-Cal Payments of AFDC Recipients	720,000	50% U.S. 50% State
Medi-Cal Benefits to Non-AFDC Recipients	300,000	50% U.S. 50% State
4. General Assistance	18,000	100% County

1/ After June, 1983, all qualifying persons (both Indian and non-Indian) residing on the Square portion of the Hoopa Valley Reservation and all Hoopa Valley Tribe members and their families residing in communities surrounding the Square became eligible for a Food Distribution Program administered by the Tribe.

The Funding Sources listed in the table above are described below:

1) AFDC. AFDC payments are funded 50% by the United States, 40% by the State of California and 10% by Humboldt County. The State of California also funds 25% of the administrative costs of the AFDC program attributable to ZIP code 95546; the administrative costs for 1983 were $24,000.

2) Food Stamps. The Food Stamp Program is funded 100% by the United States, although Humboldt County funds 25% of its administrative costs. However Plaintiff Hoopa Valley Tribe operates a Food Distribution Program under the Food Stamp Act of 1978. All qualifying

people (both Indians and non-Indians) residing on the Square, and families with at least one tribal member residing in off-Reservation communities surrounding the Square, became eligible for the tribally-administered Food Distribution Program in June 1983. Figures are not readily available for the number of Indian and non-Indian recipients of Food Stamps who withdrew from the county-administered Food Stamp Program to participant in the tribally-administered Food Distribution Program because a family is legally entitled to switch from the Food Stamp Program to the Food Distribution Program and vice versa at the beginning of each month, but may not use both in any single month. Plaintiff Hoopa Valley Tribe bears 25% of the administrative costs of the Food Distribution Program.

3) Medi-Cal. The federal government and the State of California each funds 50% of the Medi-Cal Program. Humboldt County funds 25% of its administrative costs. Those administrative costs attributable to the ZIP code area 95546 are not known.

4) General Assistance. Humboldt County funds 100% of the General Assistance Program.

I. Mental Health Services.

Humboldt County contracts with a licensed Doctor of Psychology to provide mental health services to residents of the Reservation and surrounding area at an annual cost of $32,000. The psychologist provides mental therapy services to both enrolled members of plaintiff Tribe, non-enrolled Indians and non-Indians. The psychologist estimates that 95% of his patients are Indians, but does not maintain patient records indicating race, or tribal affiliation if any.

The California State Department of Mental Health Services also provides services for Indian and non-Indian residents of the Reservation area at a cost in 1983 of $99,750, a cost comparable to that of previous years.

J. Hospital and Medical Services.

The Hupa Health Association, Inc., a subordinate enterprise of plaintiff Hoopa Valley Tribe, provides a medical and dental clinic and doctors and dentists to enrolled tribal members and other Indians, and to pregnant non-Indian spouses of Indians, residing anywhere in the Klamath-Trinity Joint Unified School District, except Orleans, both on and off the Reservation. The annual budget of the Hupa Health Association, Inc. is approximately $1.5 million, $1.2 million of which is funded by the United States Indian Health Service. Enrolled tribal members, other Indians, and pregnant non-Indian spouses of Indians residing anywhere in the school district, except Orleans, both on and off the Reservation, obtain free medical and dental services at the clinic and are referred to other hospitals, doctors, and dentists whenever the clinic's facilities prove inadequate. Both doctors' fees and all hospital and other medical costs incurred in such referrals are paid by the United States Indian Health Service.

The only hospital on the Reservation is the Klamath-Trinity Hospital, a private hospital which contracts with the County to provide services to residents of the area. In recent years, the hospital has been funded by Humboldt County at approximately $500,000 per year, but the funding ceased when the hospital became a private facility on November 11, 1982. In 1983, the County made no direct appropriation to the hospital, although the County indirectly appropriated $150,000 to the hospital to establish a reserve fund. The hospital provides six beds. Complicated cases

which the hospital is unable to treat are referred to other hospitals within Humboldt County.

K. Ambulance Services.

The Hupa Health Association, Inc., maintains the only ambulance within a radius of 20 air miles (55 miles by highway) from Hoopa, including both on and off-Reservation communities. Funding for the ambulance service is largely provided by the United States Indian Health Service ($68,000 for FY 1984) with a $5,000 annual contribution from Humboldt County. The ambulance serves both Indians and non-Indians residing both on and off the Reservation.

L. Prenatal and Mental Health Clinics.

Humboldt County maintains a prenatal clinic and mental health clinic in Willow Creek, some 12 miles south of the Reservation, both of which provide out-reach services inside the Reservation. The cost of these clinics attributable to enrolled members of plaintiff Hoopa Valley Tribe is not known, but the clinics provide services in an area in which a majority of the residents are non-Indian.

M. Solid Waste Disposal.

Humboldt County maintains a solid waste transfer station six miles south of the Reservation border. The cost of maintaining the transfer station in 1983 was $39,250. Because the Bureau of Indian Affairs maintains a solid waste landfill at Supply Creek inside the REservation, it cannot be determined whether any enrolled Tribal members or other Reservation Indian or non-Indians residents use the County solid waste transfer station.

N. Humboldt County Airport.

Humboldt County operates an airport on the Reservation at a cost of $3,000.00 per year in county funds. The airport was made possible by a rent free lease to the county of 52 acres of tribal trust land valued at approximately $182,000.

O. Public Radio.

There are two public radio stations located in Humboldt County. One is a very low power (10 watt) transmitter located at Humboldt State College. Its broadcast can only be received in the immediate vicinity of the campus near Arcata. The second public radio station in the county is KIDE, a Hoopa tribal enterprise, which has a 250 watt transmitter and three translators, which relay and boost the signal strength, thus providing service to nearly all of central and northern Humboldt County, including the major non-Indian population center of Eureka. Two of the broadcast translators are located off the Reservation specifically to provide public radio service to the Willow Creek area and to the Eureka area. KIDE is financed wholly by the Tribe and currently receives no state or county funding. Broadcast equipment for KIDE was purchased with federal grants totaling approximately $285,000.

P. Hoopa Valley Public Utility District.

Drinking and irrigation water is provided throughout the Square portion of the Reservation by the Hoopa Valley Public Utilities District, a tribal enterprise. The District services both Indians and non-Indians residing on the Square. The water system was constructed with federal funds from HUD, the BIA, and the EDA totaling $2,622,000. No state or county funds were provided for construction of the water system. Although the District

derives some income from user fees, it is subsidized by tribal funds and federal funds from the Indian Health Service. In 1983, the federal subsidization for operating expenses amounted to $68,000, and the tribal subsidization was $24,000. No state or county funds support the operation of the District.

Q. Low Income Housing.

Low income housing is provided on the Square portion of the Reservation by the Hoopa Valley Indian Housing Authority, a tribal enterprise. Three forms of subsidized housing are provided by the Authority. The Authority operates 13 tribally-owned units that are open to both Indian and non-Indian low income families. The Authority also operates 30 low income housing units open to households with one or more tribal members. Finally, the Authority is now building 42 units of mutual help housing with a $3.2 million loan guaranteed by HUD. The mutual help housing will be open to households with one or more tribal members. Neither the State nor County provides any low income housing on the Square.

R. Indian Child Welfare Program.

The Hoopa Valley Tribe operates an Indian Child Welfare Program pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901-63. The program serves all Indians residing in the Klamath-Trinity Joint Unified School District, including Indians residing off the Reservation. Adjudications of Indian child welfare matters, such as child custody and placement in foster homes, are handled by the Hoopa Valley Business Council in the absence of a tribal court system. The program is funded primarily by a BIA contract for $150,000 per year which includes the costs of payments to foster families for supporting Indian children.

S. Tribal Recreational Programs.

The Hoopa Valley Tribe Recreation Department operates recreation programs that are open to both Indians and non-Indians residing both on and off the Reservation. The recreation program is supported by approximately $55,000 per year in tribal funds. The facilities utilized by the recreation program, which include an Olympic-size swimming pool, tennis courts, six softball fields, two community parks and playgrounds, and a gymnasium, were constructed with federal and tribal funds. In addition to the use of these facilities by non-Indians residing in off-Reservation communities such as Willow Creek, the tribal gymnasium has been regularly used by the Klamath-Trinity Joint Unified School District at no charge. None of the recreation programs is supported with county or state funds, and none of the facilities was constructed with such funds.

Tribal members also use off-Reservation facilities maintained by the State or County.

T. Economic Development.

Plaintiff Hoopa Valley Tribe administers a federal EDA Revolving Loan Program of $1.2 million. Administration costs are borne entirely by the Tribe. The program makes low-interest loans to Indians wishing to start or expand businesses. Off-reservation Indian businesses within a 100-mile radius of Hoopa, as well as on-reservation Indian businesses, are eligible for the loans.

U. Hoopa Manpower Program.

In FY 1983, the Hoopa Manpower Program operated four programs: a Small Business Development Program, an Arts and Crafts Marketing Program, a CETA Basic Job Training Program and a CETA Summer Youth

Employment Program. The Small Business Development Program, which trains and gives assistance to persons operating small businesses, was open to all business persons in northeastern Humboldt County, including both Indians and non-Indians. The program consisted of 16 seminars, in which approximately 15-20% of the participants were non-Indian. The program was funded from April, 1983 through November, 1983 by a Department of Labor grant of $93,000.

The Arts and Crafts Marketing Program was funded in FY 1983 by a $165,000 grant from the Department of Labor under Title 7 of the Native American Private Sector Initiative Program. For Fiscal Year 1984, the Small Business Development Program and Arts and Crafts Marketing Program will be funded jointly under a Department of Labor grant of $125,000.

In FY 1983 the Department of Labor provided approximately $99,400 funding for the CETA Basic Job Training Program operated by Hoopa manpower. Department of Labor funding of approximately $54,000 was provided to the CETA Summer Youth Employment Program. In FY 1984, CETA has been replaced by the Partnership Act. Department of Labor funding for nine months under that Act will be approximately $60,000 under the Native American Set Aside Program. It is also anticipated that the Department of Labor will fund a Summer Youth Training Program with an estimated $30,000 in federal funds.

V. Other Services.

In the summer of 1983 the State of California asked plaintiff Hoopa Valley Tribe for permission to spray one-sixth of the area inside the Reservation for a maggot akin to the Mediterranean fruit fly. Plaintiff Hoopa Valley Tribe

acceded to the request and the spraying was done at County expense. The Tribe did not seek the spraying.

The costs attributable to plaintiff Hoopa Valley Tribe and its members by virtue of services rendered by the Humboldt County District Attorney's and Public Defender's offices and the Humboldt County Public Library are unknown.

W. Services Relating to Indian Timber.

Neither the State of California nor Humboldt County exercise any regulatory jurisdiction or management responsibility over timber on trust land within the Hoopa Valley Reservation. Although the State is party to an agreement with the Bureau of Indian Affairs by which each provides emergency fire fighting services for a 24-hour period on lands deemed to be "mutual threat areas" under the jurisdiction of the other, the primary purpose of this agreement is to prevent the spread of fires between jurisdictions. The reciprocal nature of the agreement results in a balancing of costs and therefore the State does not expend any unreimbursed state funds with respect to timber or timber lands inside the Reservation.

16. Logging Controls on Federal Non-Indian Land.

Nearly all federal non-Indian timber land is managed by either the Department of Agriculture (United States Forest Service) or the Department of the Interior (Bureau of Land Management).

The regulations promulgated by these agencies are at least as effective in terms of promoting timber yield management and land and water quality as the comparable regulations of the Bureau of Indian Affairs.

17. Analysis of State Timber Yield Taxes.

The FTRA was enacted in 1976 as a substitute for the property tax previously imposed by the counties upon timber (Stats. 1976., Ch. 176). As originally enacted in 1976, the FTRA imposed two taxes on timber harvested on or after April 1, 1977: a timber yield tax and a timber reserve tax. (Rev. & Tax Code §§ 38115 and 38301). As used in this Stipulation, the term "timber yield tax" generally refers to both taxes unless the context indicates otherwise. The rate of both taxes has varied over the years:

Year	Timber Yield Tax Rate	Timber Reserve Tax Rate
1977	6%	0.5%
1978	6%	0.5%
1979	3%	----
1980	3%	----
1981	3%	1.7%
1982	2.9%	5.2%
1983	2.9%	----

Revenues collected under the FTRA are distributed among the timber-growing counties in California after deduction of State administrative expenses. As originally enacted, each such county received an amount equal to 100% of the annual yield tax minimum revenue guarantee certified by the County Assessor pursuant to Government Code § 27413. (Rev. & Tax. Code § 38905). The annual yield tax minimum revenue guarantee was an amount equal to the average property tax revenue attributable to timber received by the taxing agencies within the county for the 1972, 1973 and 1974 tax years.

The annual yield tax minimum revenue guarantee certified by the Humboldt County Assessor included tax collected on possessory interests in tribal timber described in Paragraph 11, above. Due to the unavailability of the pertinent records, the Humboldt County assessor cannot now determine the amount of tax collected on possessory interests in tribal timber which was included in the annual yield tax minimum guarantee. It is clear, however, that the pre-FTRA taxes collected on possessory interests in Hoopa tribal timber were substantially less than the timber yield tax collected on Hoopa tribal timber under FTRA. (See Paragraphs 2 and 11, above).

The 6% timber yield tax for 1977, was set with a view of returning sufficient revenues to guarantee each county's minimum revenue guarantee. Determination of the appropriate rate required an estimate of the total timber harvest that could be anticipated. The estimated timber harvest used to set the tax rate included timber grown on federal Indian and non-Indian land. Between 1977 and 1982, when the distribution scheme for FTRA revenues was amended as described below, a substantial portion of the taxation of Hoopa timber under FTRA did not benefit Humboldt County, but instead in effect reduced the FTRA timber yield tax rate for all timber producers in the State. This occurred because the prior possessory interest tax revenues on Hoopa tribal timber, which were used to calculate the humboldt County minimum revenue guarantee, were substantially less than the FTRA revenues generated by application of the timber yield tax to Hoopa tribal timber.

As originally enacted, if the revenues of the timber yield tax (after deduction of State administrative expenses) were insufficient to meet the annual yield tax minimum revenue guarantees of the various counties, the deficit was to be made up from the Timber Reserve Tax revenues. If the timber yield tax revenues exceeded the amount necessary

to meet State administrative expenses and the yield tax minimum revenue guarantees of the counties, the excess revenues were transferred to the Timber Reserve Fund. When the balance in the Timber Reserve Fund exceeded $8 million, the amount in excess of $7 million was distributed to all timber producing counties in California in proportion to the percentage of the total timber yield tax revenues derived from timber harvested in each of these counties.

The demand for timber in the late 1970s and early 1980s declined substantially due to the nationwide slump in the economy with the result that revenues collected under the FTRA were no longer sufficient to meet the timber counties' annual yield tax minimum revenue guarantees. The FTRA was therefore amended to provide that in FY 1983-84 each county was to receive only 50% of its annual yield tax minimum revenue guarantee, with any excess revenue to be distributed among the counties in the same proportion as the revenues were generated. (Stats. 1982, Ch. 1058). The timber reserve tax was repealed. (Stats. 1982, Ch. 1058). Commencing with FY 1984-85, and thereafter, all revenues collected under the FTRA will be distributed among the timber counties in the same proportion as that in which the revenues were generated. (Stats. 1982, Ch. 1058).

The following table breaks down the total FTRA revenues collected by the State, the total FTRA revenues collected from timber harvested in Humboldt County, including both Indian and non-Indian timber, the total FTRA revenues collected on timber harvested on lands held in trust for the plaintiff Tribe, and the total FTRA revenues returned to Humboldt County:

FTRA REVENUE CHART

Year	FTRA Revenues Collected by State	FTRA Revenues Collected from Humboldt County	FTRA Revenues Collected on Hoopa tribal timber 2/	FTRA Revenues Returned to Humboldt County
1977 1/	$19,103,908	$5,053,685		$ 3,529,925
1978	40,142,411	8,051,940		7,222,201
1979	29,780,581	3,874,770		9,675,020
1980	17,289,062	3,331,980		7,491,444
1981	23,297,111	4,531,787		6,513,446
1982	23,700,829	5,444,334		6,163,916
TOTAL	$153,313,902	$30,288,000	$886,837	$40,599,952

1/ FTRA was in existence for only nine months in 1977.
2/ Due to manner in which the matter is organized, it is impossible as a practical matter to allocate this amount among the different tax years.

Little if any revenue has been collected in the past on timber harvested on federal trust land on other Indian reservations in the State of California.

In 1977 and 1978 Humboldt County received less FTRA revenue than was collected on the timber harvested in Humboldt County. The reasons were first, that proportionately more timber was being harvested in Humboldt County than was being harvested in other counties, and second, that the Humboldt County minimum revenue guaranteed component attributable to the former ad valorem property tax on possessory interests in timber from the Hoopa Valley Reservation, as detailed in paragraph 11 above, was small in comparison with the amount of taxes collected on Hoopa tribal timber under FTRA.

In the years 1979-1982, Humboldt County received more FTRA revenue than was collected from timber harvested in Humboldt County. The reason was that although the FTRA taxes collected on Hoopa tribal timber continued to be substantially greater than the county's minimum revenue guarantee component attributable to the former tax on possessory interests in Hoopa tribal timber, this was more than offset by a substantial reduction in the acreage in Humboldt County available for timber harvest due to creation of Redwood National Park and designation of certain other areas as wilderness areas. Thus, for these years, Humboldt County, in effect, due to the minimum revenue guarantee system, benefitted from contributions from other counties.

18. Commencement of Business by Plaintiff Hoopa Timber Corporation.

In order to commence its timber operation for plaintiff Hoopa Valley Tribe, plaintiff Hoopa Timber Corporation successfully bid upon and obtained four timber sale contracts from the BIA in 1977. Although the timber of the four logging units had been cruised by foresters of the BIA in preparing the logging units for bid, plaintiffs Hoopa Timber Corporation based its bids upon its own cruises of each of the logging units.

In order to finance timber harvesting on the Reservation plaintiff Hoopa Timber Corporation entered into a log sale agreement with Eel River Sawmills, Inc. which provided that Eel River Sawmills, Inc. advance necessary capital to plaintiff Hoopa Timber Corporation to allow it to begin logging operations. A written contract between plaintiff Hoopa Timber Corporation and Eel River Sawmills, Inc. was entered into on the Reservation on July 29, 1977.

Both parties to the contract agreed that title to logs sold by the plaintiff Hoopa Timber Corporation to Eel River Sawmills, Inc. would pass on the Reservation when the logs were loaded onto trucks and left the landing area for the lumber mill of Eel River Sawmills, Inc.

In preliminary discussions at the lumber mill of Eel River Sawmills, Inc. the question of California timber yield tax arose and Mr. Sam Arness, President of plaintiff Hoopa Timber Corporation assured Mr. M. F. McLean, owner of Eel River Sawmills, Inc. that the tax would not apply because the standing timber was owned by the United States in trust for the plaintiff Hoopa Valley Tribe and title to felled timber after harvesting passed directly to plaintiff Hoopa Timber Corporation pursuant to Paragraph B2.1 of the Timber Sale Contract, Part B, Standard Provisions, attached to every BIA timber contract sale. As a result, both parties assumed that the California timber yield tax would not apply to any log sales from plaintiff Hoopa Timber Corporation to Eel River Sawmills, Inc.

In order to verify the foregoing conclusion, Mr. Dennis Scott, Controller of Eel River Sawmills, Inc., asked Mr. Robert Browning coordinator of company activities involving timber yield taxes, to obtain confirmation from defendant California Board of Equalization. Mr. Browning telephoned Mr. David Mayer at the Eureka office of defendant California Board of Equalization in July of 1977 and was advised by Mr. Mayer that tax liability in the instant case was uncertain and that the matter would have to be checked with Mr. Frank Schmidt and Mr. Dan Allwardt of defendant California Board of Equalization office in Eureka and also with the headquarters office of the Board in Sacramento.

Approximately one week later, Mr. Mayer had a telephone conversation with Mr. Browning during which Mr.

Mayer discussed his understanding of the Board's policy and read to Mr. Browning the letter attached hereto as Exhibit F. It was based on Mr. Browning's understanding of the telephone conversation that the Eel River Sawmills, Inc. determined the purchase price of logs purchased under the 1977 contract from plaintiff Hoopa Timber Corporation.

Log purchases by Eel River Sawmills, Inc. from plaintiff Hoopa Timber Corporation were primarily complete by September, 1978. On November 30, 1978, Eel River Sawmills, Inc. received a form letter from Mr. Paul Crebbin, Timber Tax Division, State Board of Equalization, advising Eel River Sawmills, Inc. that Eel River Sawmills, Inc. was liable for California timber yield taxes on all logs purchased from plaintiff Hoopa Timber Corporation, which totaled approximately 18 million board feet over the previous 18-month period.

19. Timber Harvesting and Log Manufacturing Operations of Plaintiff Hoopa Timber Corporation.

After having negotiated the four timber sale contracts with the BIA and the log sale contract with Eel River Sawmills, Inc., plaintiff Hoopa Timber Corporation at once began working with Eel River Sawmills, Inc. to establish itself as a log manufacturing company.

Plaintiff Hoopa Timber Corporation's four 1977 timber sale contracts pertained to a log sale area of approximately 1,000 acres. Each logging unit comprised a number of separate noncontiguous blocks. Paragraph B2.1 of the Timber Sale Contract, Part B, Standard Provisions, attached to each of the four sales, provided that title to the timber sold would pass to plaintiff Hoopa Timber Corporation at the time the timber had been scaled, paid for, and removed from the contract area. The term

"contract area" referred to in Paragraph B2.1 refers to the individual block areas within each sale.

The contract officer of the Bureau of Indian Affairs was present at the site of logging each contract. Felled timber was limbed, and dragged to the landing site where a grader of plaintiff Hoopa Timber Corporation graded the logs and ordered them bucked into appropriate lengths. The grades were as follows:

Grade Designation	Grade Explanation
XP	Pulp Wood
SC	Select Cull: Peeler or Sawmill Grade
No. 2 Sawmill	Sawmill Grade
No. 1 Sawmill	Highest Sawmill Grade
No. 3 Peeler	Plywood Veneer
No. 2 Peeler	Plywood Veneer
No. 1 Peeler	Highest Plywood Veneer Grade

Log lengths were based upon a close examination of each log for imperfections and Eel River Sawmills, Inc.'s specifications. Because of a lack of proper logging program on the Square in the past, 43% of logs harvested on the Reservation are defective, many suffering from overmaturity. Accordingly, manufacture of felled timber into logs by plaintiff Hoopa Timber Corporation is the process by which, through the exercise of expert judgment, plaintiff Hoopa Timber Corporation can effect a large increase in monetary return to plaintiff Hoopa Valley Tribe.

The volume of timber harvested from the Hoopa Valley Reservation is determined by the BIA pursuant to federal statute and regulations. Because plaintiff Hoopa

Valley Tribe and plaintiff Hoopa Timber Corporation have no control over that volume, and because the volume, even on a sustained yield basis, is insufficient to support a tribally-owned sawmill, even greater importance lies in log manufacture by plaintiff Hoopa Timber Corporation as the only present feasible method of increasing the monetary return to the Tribe from its timber resource.

After the logs of differing grades and lengths had been manufactured and trucked to the valley floor of the Hoopa Valley Reservation, they were scaled aboard their trucks by foresters of the Bureau of Indian Affairs before shipment to Eel River Sawmills, Inc.

Because of unexpected difficulties in logging operations during the year 1977, the log sale contract between plaintiff Hoopa Timber Corporation and Eel River Sawmills, Inc. was not completed until the year 1978.

As can be seen from the Timber Sale Chart of the Hoopa Valley Reservation, 1976-1983, contained in Paragraph 1 above, three of the four timber sales on the Reservation in 1978 were not made to plaintiff Hoopa Timber Corporation. And in the next five years plaintiff Hoopa Timber Corporation obtained only six sales out of 15.

In 1979 plaintiff Hoopa Timber Corporation changed its method of log manufacture. Having obtained a grant from the federal Economic Development Administration, the Corporation constructed and equipped a log sorting yard on the valley floor of the Hoopa Valley Reservation. Thereafter felled timber was hauled from the logging sites of each contract area to the log sorting yard where they were graded, scaled, bucked, rescaled and then decked, according to grade and length. Logs manufactured in the log sorting yard for the years 1979 and thereafter lost their identity in terms of specific origin. For example, logs could no longer

be identified as from a given block in a particular sale or even from the particular sale. Additionally, logs manufactured in the sorting yard could no longer be identified as having been logged by cable (highlead) or by being dragged by bulldozer to the landing site.

Although timber felled during the years 1979 and thereafter was first grade sorted at the landing site in the contract area, it was scaled in the log sorting yard after manufacture. Pursuant to Paragraph B2.1 of the Standard Contract, Part B Standard Provisions, title to the felled timber passed to plaintiff Hoopa Timber Corporation at the time it was removed from the contract sale area; thereafter title to the manufactured logs which plaintiff Hoopa Timber Corporation sold to Eel River Sawmills, Inc., passed to Eel River Sawmills, Inc. at the time the logs were manufactured at the log sorting yard, rescaled and loaded aboard trucks for Eel River Sawmills, Inc.'s sawmill.

Approximately August 1, 1981, plaintiff Hoop Timber Corporation abandoned its operations at the log sorting yard on the Reservation for the reason that the market for wood chips evaporated. Thus while plaintiff Hoopa Timber Corporation was able to sell all logs including chippable logs in previous years, it could no longer do so. Accordingly, plaintiff Hoopa Timber Corporation reverted to its 1977 format of grading and manufacturing different grades and lengths of logs at the landing site area prior to scaling.

20. The Effect of California Timber Yield Tax Upon Plaintiff Hoopa Timber Corporation and Plaintiff Hoopa Valley Tribe.

In 1977 plaintiff Hoopa Timber Corporation was given Indian preference in seeking timber sale contracts with the BIA, that is, pursuant to Bureau of Indian Affairs regulations, the Corporation was allowed to match any bid

of a non-Indian company. For all years thereafter, however, the BIA has refused to grant the Corporation Indian preference and the Corporation has only been able to obtain timber sale contracts by competitive bid with non-Indians.

Because Eel River Sawmills, Inc. had been advised in 1977 that no California timber yield tax would be due upon its purchase of logs manufactured by plaintiff Hoopa Timber Corporation, no provision was made in the contract specifically requiring plaintiff Hoopa Timber Corporation to pay the timber yield tax. However, Eel River Sawmills, Inc. did agree with plaintiff Hoopa Timber Corporation that if the contract went well and proved profitable for Eel River Sawmills, Inc., it would pay plaintiff Hoopa Timber Corporation an additional $25,000 bonus. Because defendant California Board of Equalization has now assessed and collected from Eel River Sawmills, Inc. timber yield tax in the sum of $106,740 for logs purchased from plaintiff Hoopa Timber Corporation in the 1977 sale, the 1977 log purchase contract has not been profitable for Eel River Sawmills, Inc. and therefore it has not paid the $25,000 bonus to plaintiff Hoopa Timber Corporation.

Beginning with the year 1979, Eel River Sawmills, Inc. negotiated with plaintiff Hoopa Timber Corporation regarding the California timber yield tax and it was provided in the contract for 1979, in Paragraphs 6.01-6.04, that Eel River Sawmills, Inc. would withhold the sum of $5.00 per thousand board feet of logs purchased from plaintiff Hoopa Timber Corporation to pay California timber yield taxes under protest and also provided for assignment to plaintiff Hoopa Timber Corporation of the right to refund of the timber yield tax so paid.

Similarly, the 1980 contract provides in Paragraphs 6.01-6.04 that Eel River Sawmills, Inc. would withhold the sum of $2.50 per thousand board feet of logs purchased

from plaintiff Hoopa Timber Corporation to pay the California timber yield tax under protest and also provided for assignment to plaintiff Hoopa Timber Corporation of the right to refund of that portion of the timber yield tax so paid.

Finally, the 1981 contract provides in Paragraphs 6.01-6.04 that Eel River Sawmills, Inc. would withhold the sum of $6.00 per thousand board feet of logs purchased from plaintiff Hoopa Timber Corporation to pay the California timber yield tax under protest and also provided for assignment to plaintiff Hoopa Timber Corporation of the right to refund of the timber yield tax so paid.

Now that plaintiff Hoopa Timber Corporation is not afforded the right of Indian preference by the BIA, it must compete for timber sale contracts along with much better non-Indian industrial concerns.

21. BIA Scaling of Timber and Passage of Title.

All timber sales made on the Reservation since the passage of the FTRA have been pursuant to written contracts which include "Part B Standard Provisions." Section B2.1 of each of the contracts states that "[t]itle to the timber covered by the contract shall not pass to the Purchaser until it has been scaled, paid for, and removed from the contract area." Payment for timber is made in advance of cutting, pursuant to Section B4.1 of the timber sale contract's standard provisions. The "contract area" referred to in Section B2.1 is the specific logging unit covered by the particular contract. Thus, timber is removed from the "contract area" prior to its removal from the Reservation. Prior to 1981, scaling was conducted by BIA scalers before the timber was transported outside the Reservation. Such scaling was typically done while the logs were loaded on the logging trucks. In 1981 the BIA

discovered that substantial disparities were occurring between the scaling done by BIA scalers on the Reservation and later scaling conducted by the Northern California Log Scaling and Grading Bureau (NCLSGB) on behalf of exporters and sawmills purchasing manufactured logs from Reservation timber purchasers. During the 1981 logging season, the BIA switched from scaling by BIA employees to scaling done under contract by NCLSGB. Because of the unsatisfactory results of scaling while the logs were loaded on logging trucks, and because of the impracticality of having NCLSGB scalers on the Reservation, scaling was thereafter done off the Reservation after the logs had been unloaded from the logging trucks at the location of the purchasing sawmill, or in the case of logs for export, at the loading dock. Specific safeguards were implemented by the BIA in order to assure that logs could not be diverted between the time timber was felled and the time the scaling took place.

22. Industry Practice re Payment of Taxes.

When taxes are imposed upon a timber purchaser based on the volume or value of timber purchased, it is a standard industry practice for the purchaser to include such taxes as costs when it calculates its bid for timber, effectively reducing the amount of the stumpage bid by the amount of the taxes and administrative costs, and thus passing the economic burden of the tax back to the timber owner. Similarly, when such taxes are imposed on a purchaser of manufactured logs, it is a standard industry practice for the log purchaser to take the taxes and administrative costs of calculating and paying such taxes into account in negotiating the price that it will pay for the logs, effectively reducing the price paid by the amount of the taxes and administrative costs, and thus passing the economic burden of the tax back to the log seller (i.e., the timber purchaser). In either case, the effect of these standard industry practices under normal

economic conditions is that the timber owner ultimately bears the economic burden of the tax, as described in the Affidavit of Kathleen O'Neill Green for the Plaintiffs, dated January 9, 1984.

DATED this 16th day of January, 1984.

ZIONTZ, PIRTLE, MORISSET, ERNESTOFF & CHESTNUT

By: _____
Robert L. Pirtle
Of Attorneys for Plaintiffs

DATED this 17th day of January, 1984.

JOHN K. VAN DE KAMP
Attorney General for the State of California

By: _____
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Deputy Attorney General
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35-TPSP7.4/NEV-APPN.2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

THE HOOPA VALLEY TRIBE, et al., Plaintiffs, v. RICHARD NEVINS, et al., Defendants.	No. C 82 5903 MHP [EXHIBITS TO] STIPULATION OF FACTS

Contents:

Ex. A California Property Tax Rule 1026

Ex. B 1980 Census: Excerpts relating to Hoopa Valley Reservation; with map showing location of Hoopa Valley Reservation

Ex. C 1980 Census: Excerpts relating to Census Tract 0101; with maps showing location of Census Tract

Ex. D Excerpts from "Information Profiles of Indian Reservations in Arizona, Nevada and Utah" (BIA Phoenix Area Office, 1981)

Ex. E Excerpt from "Indian Service Population and Labor Force Estimates" (BIA, January 1983)

Ex. F Letter from J. J. Delaney, Chief Counsel, State Board of Equalization, to W. L. Barber, Attorney for Hoopa Valley Tribe (July 15, 1977).

Ex. G Timber Contract for the Sale of Estimated Volumes (Parts A and B) between Superintendent of the Northern California Agency, BIA, and Glenn Moore Logging (Approved July 20, 1983).

[EXHIBITS NOT REPRODUCED FOR APPENDIX]

Supreme Court, U.S.
FILED
JAN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-686

In The

Supreme Court of the United States

October Term, 1989

RICHARD NEVINS, CONWAY COLLIS, ERNEST DRONENBURG, WILLIAM BENNETT, CALIFORNIA STATE BOARD OF EQUALIZATION AND STATE OF CALIFORNIA,

Petitioners,

vs.

HOOPA VALLEY TRIBE AND HOOPA TIMBER CORPORATION,

Respondents.

PETITIONERS' REPLY MEMORANDUM

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This is not a garden variety preemption case. On the contrary, this case gives this Court its first opportunity to review a tax on non-Indian purchasers of Indian goods in the context of undisputed proof that the revenues from the tax are used to fund services which directly benefit the tribe in question. Thus, this case presents an important question of federal law within the meaning of Rule 17.1(c).

As we stated in our petition (pp. 6-7), the Ninth Circuit misapplied this Court's decision in *Cotton Petroleum Corp. v. New Mexico*, ___ U.S. ___, 109 S.Ct. 1698

(1989). *Cotton Petroleum* mandates a flexible preemption approach which places a greater emphasis on the states' revenue needs than do the earlier cases on which the Ninth Circuit relied, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982). The fact that, as of this writing, *Cotton Petroleum* is less than a year old is irrelevant to the suitability of this case as a vehicle to provide what then-Justice Rehnquist described as a need for predictability in this area of the law. *Ramah, id.*, dissenting, at 847.

The Tribe also misstates the issue in this case. This is evident from the following:

THE ISSUE (Petition, p.i)	THE TRIBE'S REVISION (Brief in Opp., p.7)
Whether California may impose timber tax on a non-Indian purchaser of timber harvested on an Indian reservation *if the revenues from the tax are used to fund general government services* to the Indian tribe even though the revenues do not directly fund the production of the timber? (Emphasis added.)	Accordingly, petitioner here seeks to abandon the Court's balancing of interests in favor of a broad rule permitting state taxation of revenues generated on Indian reservations *if individuals received state services.* (Emphasis added.)

Lastly, the Tribe suggests that the judgment in its favor can be sustained "on several other grounds." (Brief in Opp., p. 10) But none of these grounds were even briefed by the parties in the proceedings below, let alone

ruled upon, and they also assume incorrectly that the California tax is imposed on the Tribe. In fact the tax falls upon the non-Indian purchasers. (Pet. App., p. A-6)

DATED: January 12, 1990

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